BEFORE THE ARIZONA CORPORATION COMMISSION

IN THE MATTER OF U S WEST COMMUNICATIONS, INC.'S COMPLIANCE WITH SECTION 271 OF THE TELECOMMUNICATIONS ACT OF 1996

Docket No. U-0000-97-238

U S WEST COMMUNICATION, INC.'S OPPOSITION TO THE MOTION OF AT&T COMMUNICATIONS OF THE MOUNTAIN STATES, INC., TCG-PHOENIX, MCI WORLDCOM, INC., AND SPRINT COMMUNICATIONS COMPANY, L.P., TO COMPEL RESPONSES TO DATA REQUESTS JI-130, JI-131, JI-132 AND JI-133

I. Introduction and Summary

U S WEST Communications, Inc. ("U S WEST) submits this opposition to the motion of AT&T Communications of the Mountain States, Inc., TCG-Phoenix, MCI WorldCom, Inc. and Sprint Communications Company, L.P. (collectively, "ATMS") to compel U S WEST to respond to data requests JI-130, JI-131, JI-132 and JI-133 (the "Motion to Compel"). ATMS seek to obtain documents and analyses that non-testifying experts prepared for U S WEST at the direction of counsel and in anticipation of litigation. As the state commissions in Montana and Nebraska have determined with respect to the very documents at issue here, the documents are protected from discovery based on long-established privileges. After thorough in camera review, Montana and Nebraska commissions have concluded that these documents are protected from discovery based on the attorney-client and work product privileges. This Commission should be guided by the analysis of its colleagues in Montana and Nebraska and should reach the same result.

ATMS's effort to obtain these document implicates U S WEST's right to consult freely with its attorneys and for those attorneys to perform investigations with the assistance of expert consultants. ATMS would have the Commission violate applicable privileges, strip U S WEST

of its legal rights, and act inconsistently with the fair administration of justice. For these reasons and for the reasons set forth below, U S WEST asks the Commission to reject ATMS's Motion to Compel.

The documents at issue consist of reports and other written materials that outside consultants prepared to assist U S WEST's attorneys in advising U S WEST of the nature of any litigation risks associated with the operations support systems ("OSSs") that U S WEST is developing to provide competitive local exchange carriers ("CLECs") with access to ordering, billing, and related functions. In addition to having been prepared for litigation, these documents contain U S WEST counsel's mental impressions and legal theories.

Because U S WEST's counsel commissioned the reports to assist them in rendering legal advice to U S WEST, the attorney-client privilege protects the reports from disclosure. Courts around the country hold that the attorney-client privilege is absolute and shields privileged documents from discovery regardless of need. The affidavits of attorneys for U S WEST, Laurie J. Bennett and Raymond C. Fitzsimons, which are attached as Exhibits A and B, respectively, establish that U S WEST counsel relied upon the reports in rendering legal advice to U S WEST. Furthermore, as the Nebraska special master recognized in upholding U S WEST's claim of attorney-client privilege, these reports constitute "communications" within the meaning of the attorney-client privilege.

These reports are also protected from discovery by the attorney work product doctrine. The affidavits of Ms. Bennett and Mr. Fitzsimons establish that the only reason U S WEST requested the consultants to prepare these materials was to assist them in rendering legal advice regarding pending and anticipated litigation arising under the Telecommunications Act of 1996 ("the Act"). The consultants prepared the OSS assessments specifically to assist U S WEST in proceedings before state commissions in which a primary issue was defining the nature of U S WEST's OSS obligations under the Act and the FCC's First Report and Order. In addition, U S WEST commissioned these evaluations to assess litigation risks and prepare legal strategies

for its filings with state commissions and the FCC under section 271 of the Act. Contrary to ATMS's assertions, these documents were not prepared in the ordinary course of business; they never would have been prepared but for U S WEST's involvement in litigation under the Act.

Moreover, U S WEST counsel had substantial involvement in directing the consultants' activities, reviewing their work and preparing the final reports. The reports, therefore, necessarily reflect counsel's thought processes, opinions, and legal theories. Such opinion work product is afforded heightened legal protection. Furthermore, the documents reflect the thought processes and opinions of the non-testifying consultants U S WEST retained in anticipation of litigation, which are also protected from disclosure under the Arizona Rules of Civil Procedure. Finally, they are protected by the self-evaluation privilege, which protects from discovery efforts of a corporation to examine its operations when protection will serve the public interest.

ATMS cannot make the type of substantial showing required to overcome the protections afforded by these privileges. Arizona law, like the law throughout the country, recognizes that the attorney-client privilege is absolute and that the other discovery protections can be overcome only in limited circumstances and only, at a minimum, upon a demonstration of substantial need. ATMS cannot demonstrate substantial need, since they are free to retain their own consultants to evaluate U S WEST's OSSs. ATMS have both the resources and the access to U S WEST's OSS gateways needed to conduct an evaluation. The attorney work product doctrine requires ATMS to do their own work instead of piggybacking on U S WEST's trial preparation. Moreover, U S WEST has provided ATMS with substantial material about OSS testing pursuant to other discovery requests. Thus, ATMS's ability to analyze U S WEST's OSS systems will not be hampered by failing to obtain these privileged documents.

For these reasons and the reasons set forth below, the Commission should follow the results in Montana and Nebraska and reject ATMS's motion to compel U S WEST to respond the data requests at issue.

II. Procedural History and Statement of Facts

A. Procedural History

Responding to ATMS's 287 data requests in this proceeding, U S WEST has produced tens of thousands of pages of documents and detailed, narrative answers relating to their many areas of inquiry. Approximately 250 of these requests concern OSS and/or performance measures. Thus, ATMS have received substantial information from U S WEST on these topics. U S WEST, however, has objected to a limited number of them on various grounds, including objections based on the attorney-client privilege and the attorney work product doctrine.

Specifically, on April 26, 1999, U S WEST objected to the four data requests at issue on the grounds that the requests seek the production of documents protected by the attorney-client privilege, the work product doctrine and the self-evaluation privilege. Shortly thereafter, on May 7, 1999, U S WEST filed a Privilege Log identifying and describing a limited number of documents that it was withholding from production in response to the four data requests at issue here.[1] ATMS filed their Motion to Compel on May 17, 1999, seeking to compel disclosure of the 25 privileged documents included in the Privilege Log.

B. Statement of Facts

ATMS assert that U S WEST must produce the OSS assessments. Their position rests on two fundamentally incorrect factual premises. First, ATMS incorrectly assume that the consultants performed their work in the ordinary course of business, not in anticipation of litigation. Second, they wrongly contend that the documents do not reflect attorney thought processes.

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[1] ATMS's assumption regarding the actual data requests at issue here, see Motion to Compel at 2, is correct. As to data request JI-3, U S WEST has not withheld any documents to date. To the extent such documents are withheld in the future, U S WEST will provide a privilege log.

1. The Privileged Materials Were Prepared for Litigation.

The FCC has ordered that incumbent local exchange carriers ("ILECs") like U S WEST are obligated to unbundle their OSSs and make them available to CLECs. U S WEST developed its Interconnect Mediated Access system ("IMA"), which affords access through an electronic gateway to U S WEST's OSSs. In mid-1997, CLECs began challenging the access that U S WEST was providing to its OSSs, focusing primarily on the access IMA provides. These challenges to U S WEST's OSSs have occurred in arbitrations and other litigation in federal courts, state courts, and public utility commissions throughout U S WEST's 14-state region. A central focus in these proceedings has been attempting to define the nature of U S WEST's OSS obligations under the Act and the FCC's First Report and Order and evaluating U S WEST's compliance with those obligations. For example, the Colorado Public Utilities Commission initiated a show cause proceeding on September 30, 1997 (Docket No. 97C-432T), alleging that U S WEST had failed to meet its OSS obligations. Affidavit of Raymond C. Fitzsimons ("Fitzsimons Aff.") ¶¶ 3-5.

In addition to these proceedings, in the summer of 1997, U S WEST began to consider initiating actions under section 271 of the Act to obtain authorization to provide long distance service in its region. FCC pronouncements established that U S WEST's satisfaction of OSS requirements would be an issue in these section 271 proceedings. Id. ¶ 5.[2]

Given the importance of OSS issues in the arbitrations, the Colorado litigation, and in the section 271 proceedings the company was considering, U S WEST commissioned three consulting firms to conduct separate assessments of any litigation risks associated with the

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[2] ATMS suggest that it is somehow significant that some of the OSS reports were prepared near the time the FCC issued its decisions on other BOC 271 applications. Motion to Compel at 14. Those decisions, however, confirmed that U S WEST would likely face challenges to its OSS interfaces in 271 proceedings and made it clear that OSS analyses were foundational for those proceedings. In other words, the timing that ATMS cite actually supports the fact that the analyses were performed in anticipation of litigation..

company's OSSs. The purpose of each of these studies was to assist U S WEST's counsel in providing legal advice and representation in the pending Colorado litigation and in the section 271 proceedings for which the company was preparing. Id. ¶ 6; Affidavit of Laurie J. Bennett ("Bennett Aff.") ¶¶ 3-4.

2. The Nature of the OSS Evaluations

U S WEST initiated one OSS study in October 1997 at the request of then in-house counsel for U S WEST, Raymond Fitzsimons, Assistant General Counsel -- Litigation. Mr. Fitzsimons requested a consulting firm to perform a study of IMA to assist U S WEST in the Colorado litigation and to enable him and other counsel for U S WEST to provide legal advice in connection with the section 271 proceedings. Specifically, Mr. Fitzsimons anticipated that U S WEST would use the study to develop its responses to claims by AT&T, MCI and other CLECs that U S WEST was not complying with its OSS obligations. The demands of litigation, not issues arising in the normal course of business, caused Mr. Fitzsimons to request the study. Id. ¶ 6.

From the outset, Mr. Fitzsimons told the consulting team that the study was highly confidential, that it was commissioned to enable U S WEST to assess and defend its OSS performance in pending and anticipated litigation, and that the final work product was to be provided only to the U S WEST Law Department. Throughout the period of the study, Mr. Fitzsimons personally directed the consultant's efforts. He received periodic status reports from the consultant, and he provided legal guidance that helped shape both the methodology the consultant used to evaluate OSS performance as well as the scenarios it selected to simulate actual system performance. The study and its results, therefore, contain Mr. Fitzsimons' thought processes, opinions, and conclusions regarding legal requirements and issues raised in pending and anticipated litigation concerning U S WEST's OSS performance. Id. ¶¶ 7-9. In addition, the report sets forth the consultant's conclusions, opinions, and mental impressions.

The consulting firm completed this study in May 1998. It delivered a single copy of the final report directly to Laura Ford, an in-house attorney who succeeded Mr. Fitzsimons on the OSS project. The cover and each page of the study contain the legend: "Privileged -- Attorney/Client Correspondence Prepared in Anticipation of Litigation." Since receiving the report, U S WEST has maintained its confidentiality by strictly limiting its access to counsel for U S WEST and a small group of employees directly and intimately involved in OSS issues. Counsel for U S WEST have used, relied upon and continue to rely upon the study to provide legal advice to U S WEST regarding pending and anticipated litigation. Id. ¶ 9-10.

U S WEST's Information Technologies organization commissioned a separate evaluation of IMA in September 1997. In mid-1997, U S WEST employees from that organization were working closely with U S WEST's Law Department to assist in defending the pending claims relating to U S WEST's OSS performance and in preparing for the section 271 proceedings. To that end, they requested another consulting firm to evaluate IMA and assess any litigation risks associated with it. Their request for the evaluation arose solely in the context of litigation, not in the ordinary course of U S WEST's business. Id. ¶ 10.

Because this study was requested specifically for potential use in litigation, the Information Technologies organization consulted with Mr. Fitzsimons concerning the steps to take to ensure that the study would be confidential.[3] Based on the advice of U S WEST's counsel, the consulting team involved in the project was instructed that the study was confidential and that information relating to it should not be disclosed to anyone other than the U S WEST employees who also were directly involved. Id. ¶ 11.

Mr. Fitzsimons monitored the preparation of the report. He reviewed two drafts before the consultants issued the final report in October 1997, and he provided substantive comments to

[3] Far from weakening any privilege claim, the fact that U S WEST employees consulted with counsel to ensure that the report at issue was adequately protected bolsters U S WEST's claim that the documents were not prepared in the ordinary course of business and only in anticipation of litigation.

both drafts. The report contains the conclusions, opinions, and the mental impressions of the consulting firm. The consulting firm was fully aware that U S WEST intended to use the report in connection with litigation. Accordingly, each page of the final report is marked with the legend: "Confidential Attorney/Client Privilege -- Attorney Work Product." Id. ¶ 12. The consulting firm produced only two copies of the report to U S WEST: one to Mr. Fitzsimons in his capacity as litigation counsel for U S WEST and the other to the employee in the Information Technologies organization who had consulted with Mr. Fitzsimons about the project. U S WEST has maintained the confidentiality of that report, disclosing it only to counsel and a small group of employees directly involved in the Colorado litigation concerning OSS performance issues. Id. ¶ 12.

The circumstances surrounding the preparation of the third OSS evaluation are similar to those for the other two studies. In Summer 1997, Laurie Bennett, Corporate Counsel in U S WEST's Law Department, engaged another consulting firm to analyze legal issues which could arise under section 271. Ms. Bennett specifically commissioned the study for use in preparing for proceedings under section 271. Her request for the study was motivated only by anticipated litigation, not issues arising in the ordinary course of U S WEST's business. Ms. Bennett oversaw the project and had the principal role in communicating with the consulting firm. Her involvement included working closely with the consultants to develop the scope of the project, and the study, therefore, reflects her thought processes. In addition, the study contains the consulting firm's conclusions, mental impressions, and thought processes. Bennett Aff. ¶¶ 3-5.

When she engaged the consulting firm, Ms. Bennett explained to the consultant managing the project that the study was confidential and that U S WEST would use it to prepare for section 271 litigation. Accordingly, the written materials the consulting firm presented to U S WEST bear the inscription, "Prepared in Anticipation of Litigation - Attorney Client Privilege." The study was closely held and was disseminated only to a small group of employees who were

involved in the section 271 decision process. Ms. Bennett has relied on the study to provide legal advice to U S WEST concerning the section 271 proceedings. Id. ¶¶ 5-6.

III. Argument

A. The Montana and Nebraska Commissions Have Already Decided that the Documents at Issue Are Not Discoverable.

In discussing the rulings of prior commissions, ATMS fail to mention that the only two commissions that have reached the merits of U S WEST's privilege claims based on a review, with the benefit of reviewing the actual documents, have upheld the protections and rejected arguments virtually identical to those ATMS now raise in support of the Motion to Compel. For example, the Montana Commission adopted the decision of an appointed special master, made after reviewing in camera the very documents at issue here. The special master appointed by the Commission in that case concluded:

> From all arguments presented and the discussion above, the proper legal conclusion is that USW's OSS studies and related documents are attorney-client privileged. The OSS studies were developed to assist in rendering legal advice, the studies have been maintained as confidential for that purpose, and the studies were confidentially transmitted to the attorneys. . . . [Therefore U S WEST] need not produce the OSS studies or documents related to those studies.

Ex. C (Montana Special Master Decision) ¶ 37. He found further:

> [I]f it were the case that USW's studies and related documents were not attorney-client privileged (which they are) they would be protected as opinion work product because the studies and related documents are mental impressions, conclusions, opinions or legal theories of USW's attorneys or other representatives. Additionally, because the requisite showing for access to the information has not been made, to the extent that the remaining information in issue . . . not protected by the attorney-client privilege amounts to opinion work product . . . it is protected as opinion work product and is not discoverable.

Id. ¶ 44 (parentheticals omitted, emphasis added). The Montana special master also embraced U S WEST's claim that the documents at issue are entitled to the protection afforded by the rule against discovery of facts known to or opinions held by non-testifying expert consultants under

Montana's civil discovery rule, which like Arizona's Rule 26(b)(3), is based on Federal Rule of Civil Procedure 26(b)(3). Id. at ¶¶ 45-48.

Likewise, reviewing these same documents and rejecting arguments identical to those advanced by ATMS here, a special master appointed by the Nebraska Commission in U S WEST's section 271 proceeding also held that the documents at issue are protected from discovery by both the attorney-client privilege and the attorney work product doctrine. Ex. D (Nebraska Special Master Decision).

ATMS ignore the Montana and Nebraska rulings and, instead, focus on an order issued by the New Mexico State Corporation Commission (the "New Mexico Commission") relating to these documents. However, they distort the result in New Mexico and wrongfully contend that the decision there compels production of the documents in this case. Significantly, ATMS fail to disclose some critical facts from the New Mexico decision. For example, they do not reveal that the New Mexico Commission "assum[ed] without deciding that the consultant reports fall within the attorney-client privilege" and observed that the documents "appear to constitute attorney work product." See New Mexico Order ¶¶ 31-32.[4]

Similarly, ATMS do not disclose that the New Mexico Commission did not order U S WEST to produce the documents at issue there to AT&T, or any other private party, and indeed, never ruled on the merits of AT&T's motion to compel there:

> AT&T's Motion to Compel Responses to its First Discovery Requests will not be finally decided until after in camera review by the Commission of the 25 disputed documents.

New Mexico Order ¶ 1 at p. 28 (emphasis added). The New Mexico Commission merely ordered U S WEST to provide the disputed documents to the commission for an in camera

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[4] Although the New Mexico Commission did believe that showings were made to overcome the work product protection, the commission never ordered the production of any of the documents at issue there. Moreover, U S WEST has provided ATMS with substantial testing materials in this proceeding, thereby nullifying any substantial need found by the New Mexico commission.

review. Id.[5] As stated before, after in camera reviews in Montana and Nebraska, those commissions deemed the materials protected.

As discussed above, the very issues presented here have been previously decided in U S WEST's favor by commissions in Nebraska and Montana. Therefore, this Commission need not spend its valuable time and resources in re-evaluating ATMS's unpersuasive arguments yet a third time.[6] The documents at issue are not discoverable, and the Commission should, therefore, deny ATMS's Motion to Compel in its entirety.

B. The Attorney-Client Privilege Bars Production of the Reports.

The attorney-client privilege in Arizona protects the documents listed in the Privilege Log from disclosure. As the Supreme Court of the United States recently observed, the attorney-client privilege is one of the law's oldest and most venerable privileges in the law. Swidler & Berlin v. United States, 118 S. Ct. 2081, 2084 (1998). Arizona law confers strong protection to communications between attorneys and their clients. The privilege afforded to attorney-client communications is embodied in statute: "An attorney shall not, without the consent of his client, be examined as to any communication made by the client to him, or his advice given thereon in the course of professional employment." A.R.S. § 12-2234(A) (1998).

The Arizona Supreme Court has stated that the fundamental purpose of the attorney-client privilege is "intended to encourage the client in need of legal advice to tell the lawyer the truth" with the assumption that "[u]nless the lawyer knows the truth, he or she cannot be of much

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[5] The documents were never produced to the commission because U S WEST withdrew its section 271 petition in New Mexico.

[6] ATMS appear to suggest that "[o]ther state administrative agencies" have ordered the production of privileged studies like these at issue here. See Motion to Compel at 8-9. However, none of these decisions, as described by ATMS, involved an agency's consideration of a motion to compel the production of documents over decisions of privilege or other protections as in this case. The fact that a Texas commission "ordered Southwestern Bell Telephone Company to engage in extensive workshops regarding OSS," or that another BOC expert "testified extensively regarding [OSS expert] reports in support of BellSouth's alleged compliance with its OSS obligations under the Act" is simply of no moment here. See id.

assistance to the client." Samaritan Found. v. Goodfarb, 176 Ariz. 497, 501, 862 P.2d 870, 874 (1993). Thus, while recognizing that the privilege "is not without costs," Arizona courts have steadfastly declared that "the privilege is central to the delivery of legal services in this country." Id. (citation omitted).

The privilege protects the relaying of information to attorneys to enable them to give sound and informed advice, as well as the advice itself. See Upjohn Co. v. United States, 449 U.S. 383, 390 (1981). Because of the importance of the attorney-client privilege, a showing of need cannot overcome the privilege. See A.R.S. § 12-2234 (providing no exception for "substantial need"); Admiral Ins. Co. v. United States Dist. Ct., 881 F.2d 1486 (9th Cir. 1989); Arcuri v. Trump Taj Mahal Assocs., 154 F.R.D. 97, 101 (D.N.J. 1994); State ex rel. United States Fidelity & Guar. Co., v. the Montana Second Judicial Dist. Court, 783 P.2d 911, 915, 917 (Mont. 1989); 8 Wigmore, Evidence § 2292 (McNaughton rev. 1961).

Consistent with the goal of enabling attorneys to provide the best possible legal advice, courts routinely hold that communications between attorneys, their clients, and other professionals who assist attorneys in rendering legal advice fall within the attorney-client privilege. See, e.g., United States v. Alvarez, 519 F.2d 1036, 1045-46 (3d Cir. 1975) (communications with psychiatrist); United States v. Cote, 456 F.2d 142, 144 (8th Cir. 1972) (communications with accountant); United States v. Judson, 322 F.2d 460, 462-63 (9th Cir. 1963) (same); United States v. Kovel, 296 F.2d 918 (2d Cir. 1961) (same); Golden Trade S.R.L. v. Lee Apparel Co., 143 F.R.D. 514 (S.D.N.Y. 1992) (communications with patent agent); Baxter Travenol Lab. v. Lemay, 89 F.R.D. 410 (S.D. Ohio 1981) (communications with litigation consultant); Cold Metal Process Co. v. Aluminum Co. of America, 7 F.R.D. 684 (D. Mass. 1947) (expert in minerology and crystallography could not be compelled to testify where hired by plaintiff's attorneys to aid in preparation of confidential report). State courts, too, have recognized this aspect of the attorney-client privilege. E.g., State v. Thompson, 495 S.E.2d 437 (S.C. 1998) (communications with psychiatrist retained to assist counsel with defense covered by

attorney-client privilege); Brown v. State, 448 N.E.2d 10 (Ind. 1983) (privilege covered communications between defendant and polygraph expert where expert retained to assist attorney in rendering legal advice to defendant); Conforti & Eisele, Inc. v. Dep't of Treasury, 405 A.2d 487 (N.J. Super. 1979) (construction/engineering consultants hired to assist with litigation are agents of attorney and covered by attorney-client privilege).

These courts recognize that with the increasingly technical and complex issues that require legal advice, the attorney-client privilege covers communications with subject matter experts who assist attorneys in rendering legal advice. As the court in Kovel stated, "the complexities of modern existence prevent attorneys from effectively handling clients' affairs without the help of others . . . ." 296 F.2d at 921. Analogizing to a client who speaks a foreign language, the Kovel court noted that accounting concepts -- like systems and software engineering -- are a foreign language to most attorneys. Id. at 922. Thus, the use of an accountant to interpret a client's complicated tax story should no more destroy the privilege than the presence of an interpreter because "the presence of the accountant is necessary, or at least highly useful, for the effective consultation between the client and the lawyer which the [attorney-client] privilege is designed to permit." Id. (footnote omitted). So long as the third party agent maintains the confidentiality of client communications and his participation is for the purpose of providing legal advice to the client, the privilege extends to the agent's communications with the attorney. Id.

Recognizing the complexity of modern business and the sometimes difficult application of the attorney-client privilege in the corporate client context, Arizona has codified these principles. In addition to codifying the generic privilege, the statute further provides in relevant part:

> For purposes of subsection A, any communication is privileged between an attorney for a corporation . . . or other similar entity . . . and any employee, agent or member of the entity . . . regarding acts or omissions of or information obtained from the employee, agent or member if the communication is either:

> 1. For the purpose of providing legal advice to the entity or . . . to the employee, agent or member.
>
> 2. For the purpose of obtaining information in order to provide legal advice to the entity or . . . the employee, agent or member.

A.R.S. § 12-2234(B)(1) &(2); see also State ex rel. Corbin v. Ybarra, 161 Ariz. 188, 192, 777 P.2d 686, 690 (1989) (noting that both attorney-client privilege and work product protection "must apply not only to attorneys but their agents as well").

In this case, the consultants' reports fall squarely within the privilege. As the affidavits of Mr. Fitzsimons and Ms. Bennett establish, U S WEST commissioned all three evaluations specifically to enable its counsel to render legal advice relating to the defense of actions involving OSS issues and the furtherance of section 271 filings. OSS issues are extremely technical and highly complex; in-depth understanding of these issues is beyond the reach of most attorneys. Without the evaluations from these expert consultants, U S WEST's counsel would have been significantly handicapped in providing legal advice to the company. Because the information in the reports was important to the consultations between U S WEST and its counsel and was treated confidentiality, it is protected from discovery by the attorney-client privilege.

In an attempt to prevent application of the attorney-client privilege, ATMS incorrectly assert that the written reports of expert consultants submitted to attorneys are not "attorney-client communications" and, accordingly, are not privileged. Motion to Compel at 11. Of course, there can be no serious dispute that the attorney-client privilege attaches to both oral and written communications, and that a written consultant's report prepared at the request of and submitted to an attorney constitutes a communication.

By citation to Southern Bell Tel. & Tel. Co. v. Deason, 632 So. 2d 1377 (Sup. Ct. Fla. 1994), ATMS apparently are arguing that the reports are not the sort of communication that is protected by the attorney-client privilege. Southern Bell is so readily distinguishable from the present circumstances as to be wholly inapposite. In that case, Southern Bell attorneys requested Southern Bell employees to conduct a series of audits of trouble repair reports, a collection of

data of over 1,000,000 such reports. There is no suggestion in the case that the audits contained any expert opinion or analysis, or the mental impressions or legal theories of lawyers. Since those audits comprised solely factual data, the court held that they were not the sort of communications to which attorney-client privilege attaches, although they did constitute attorney work product prepared in anticipation of litigation.

In contrast to Southern Bell, the OSS studies in this case were prepared by outside experts not corporate employees. Equally important, unlike the Southern Bell, the OSS studies here are not merely collections of factual data. They comprise the expert opinions and analyses of the consultants, they contain evaluations and recommendations regarding OSS performance, and they reflect attorneys' methodologies to support legal theories and arguments for U S WEST's position in the state arbitrations, federal court actions and section 271 proceedings. Consequently, the holding of Southern Bell regarding the attorney-client privilege for internal audits has no relevance to the instant motion.

As set forth above, there can be no serious question that reports or analyses of technical consultants who assist attorneys qualify as attorney-client privileged material. In most instances, courts determine that technical reports are or are not privileged based on the evidence of the attorneys who retained or supervised the consultants. See, e.g., Ford Motor Co. v. Leggat, 904 S.W.2d 643, 648 (Sup. Ct. Tex 1995) ("In support of this claim, Ford submitted affidavits from both in-house and outside counsel. . . . The affiants affirmatively state that the material was gathered and prepared in a specific form for use by Ford's attorneys and was treated as confidential by the attorneys and Ford. Information gathered in this way falls within the confines of the privilege as explicated in Upjohn Co."). The evidence that U S WEST provides clearly establishes that the reports are privileged communications.[7]

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[7] ATMS also appear to suggest that U S WEST voluntarily provided the documents at issue here to the Colorado Commission. See Motion to Compel at 16. U S WEST has not introduced the reports in

ATMS also suggest that Mr. Fitzsimons and Ms. Bennett were acting not as attorneys rendering legal advice, but rather as corporate officials, in connection with the documents sought. See Motion to Compel at 11-12. A plain reading of the sworn affidavits makes it abundantly clear that Mr. Fitzsimons' work in connection with the documents arose from his role as legal counsel, and not from general corporate duties. Fitzsimons Aff ¶ ¶ 3,6,7,8,9,10,11,12.

The objections to the adequacy of U S WEST's privilege log are similarly without merit. See Motion to Compel at 11-12. ATMS's claim that U S WEST is not specific enough in describing the nature of the privileged documents. Id. The purpose of a privilege log is to make a prima facie showing that the elements of the privilege are satisfied. See In re Grand Jury Investigation, 974 F.2d 1068, 1071 (9th Cir. 1992). U S WEST's log and affidavits amply meet these requirements, showing that communications were made to U S WEST attorneys for the purposes of providing legal advice. Clearly, U S WEST is not required to reveal the "contents" of those reports, as ATMS suggest, since that could waive U S WEST's privilege claims.

ATMS further suggest that it cannot discern the nature of the documents in U S WEST's privilege log. See Motion to Compel at 11-12. ATMS are well aware of the issues surrounding OSS access. From the privilege log and affidavits, it knows for whom these documents were prepared and why. Moreover, one of the movants, AT&T, also has already sought these documents in three other states, clearly demonstrating that it has sufficient information to challenge U S WEST's privilege claims. U S WEST's privilege log provides sufficient information to establish U S WEST's privilege claims without waiving them and has provided ATMS with sufficient information to challenge U S WEST's claims.

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this or any other proceeding, and, contrary to ATMS's speculative assertion, U S WEST will not introduce them in proceedings before the FCC.

C. The Work Product Doctrine Also Bars Production of the Reports.

1. Because the reports were prepared for litigation, they are work product.

The OSS documents are also protected by the attorney work product doctrine. Although the work product doctrine overlaps to some degree with the attorney-client privilege, it is nonetheless distinct. Rule 26(b)(3) of the Arizona Rules of Civil Procedure, which governs the disclosure of attorney work product, provides:

> **Trial Preparation Materials.** Subject to the provisions of subdivision (b)(4) of this rule, a party may obtain discovery of documents and tangible things otherwise discoverable . . . and prepared in anticipation of litigation or for trial by or for another party or by or for that other party's representative (including his attorney, consultant, surety, indemnitor, insurer or agent) only upon a showing that the party seeking discovery has substantial need for the materials in the preparation of the party's case and that the party is unable without undue hardship to obtain the substantial equivalent of he materials by other means. In ordering discovery of such materials when the required showing has been made, the court shall protect against disclosure of the mental impressions, conclusions, opinions or legal theories of an attorney or other representative of a party concerning the litigation.

Like the federal counterpart, by its own terms, Arizona Rule 26(b)(3) bars production not only of documents that attorneys prepare, but also materials prepared by consultants and other agents of a party when prepared in anticipation of litigation. Ariz. R. Civ. P. 26(b)(3); see also United States v. Noble, 422 U.S. 225, 238-39 (1975) ("[The work-product] doctrine is an intensely practical one, grounded in the realities of litigation in our adversarial system. One of those realities is that attorneys often must rely on the assistance of investigators and other agents in the compilation of materials in preparation for trial. It is therefore necessary that the doctrine protect material prepared by agents for the attorney as well as those prepared by the attorney himself"). The Advisory Committee notes to Fed. R. Civ. P. 26(b)(3), upon which the Arizona rule is based, emphasize that work of non-lawyers performed in anticipation of litigation is protected under the work product doctrine.

> [Rule 26(b)(3)] reflects the trend of cases by requiring a special showing not merely as to materials prepared by an attorney, but also as to materials

> prepared in anticipation of litigation or preparation for trial by or for a party or any representative acting on his behalf.

Fed. R. Civ. P. 26(b)(3) advisory committee's note.

Numerous courts recognize that documents prepared in anticipation of litigation, even by non-attorneys, fall within the work product doctrine. See, e.g., Longs Drug Stores v. Howe, 134 Ariz. 424, 429, 657 P.2d 412, 417 (Ariz. 1983) (noting that "trial preparation materials prepared by a party's representative are within the protection of the Rule") (citation omitted); Martin v. Bally's Park Place Hotel & Casino, 983 F.2d 1252, 1258-61 (3d Cir. 1993); Maertin v. Armstrong World Indus., Inc., 172 F.R.D. 143, 150-51 (D.N.J. 1997); Eoppolo v. Nat'l Railroad Passenger Corp., 108 F.R.D. 292 (E.D. Pa. 1985); Fontaine v. Sunflower Beef Carrier, Inc., 87 F.R.D. 89 (E.D. Mo. 1980); Spaulding v. Denton, 68 F.R.D. 342, 345-46 (D. Del. 1975); Empire Box Co. v. Illinois Cereal Mills, 90 A.2d 672 (Del. 1952). Furthermore, courts routinely hold that documents prepared in connection with or in anticipation of administrative proceedings are prepared in anticipation of litigation within the meaning of the work product doctrine. E.g., Martin, 983 F.2d 1252; Briggs & Stratton Corp. v. Concrete Sales & Services, 174 F.R.D. 506, 509 (M.D. Ga. 1997); Maertin, 172 F.R.D. at 149; Martin v. Monfort, Inc., 150 F.R.D. 172, 173 (D. Colo. 1993).

Finally, many courts, including the United States Court of Appeals for the Tenth Circuit, have concluded that the work product doctrine is not confined to materials specifically prepared for the litigation in which it is sought, but, "extends to subsequent litigation." Frontier Ref., Inc. v. Gorman-Rupp Co., Inc., 136 F.3d 695, 703 (10th Cir. 1998) (collecting cases); see also United States v. Phizer, Inc., 560 F.2d 326, 335 (8th Cir. 1977) (extending the work product doctrine to materials prepared in anticipation of any other litigation regardless of whether related); Duplan Corp. v. Moulinage et Retorderie de Chavanoz, 487 F.2d 480, 484-85 (4th Cir. 1973) (same); In re Grand Jury Proceedings, 43 F.3d 966, 971 (5th Cir. 1994) (recognizing that the work product doctrine applies to subsequent litigation); United States v. Leggett & Platt, Inc., 542 F.2d 655,

660 (6th Cir. 1976), cert. denied, 430 U.S. 945 (1977) (same); Republic Gear Co. v. Borg-Warner Corp., 381 F.2d 551, 557 (2d Cir. 1967) (same). This result has found support in the Supreme Court's statement in FTC v. Grolier, Inc., 462 U.S. 19, 25 (1983), that Rule 26(b)(3) of the federal rules "protects materials prepared for any litigation or trial as long as they were prepared by or for a party to the subsequent litigation."

Application of these principles to the consultant reports clearly demonstrates that the reports are attorney work product. The affidavits of Ms. Bennett and Mr. Fitzsimons conclusively establish that the reports were prepared for litigation, not in the ordinary course of business. Bennett Aff. ¶ 3-4; Fitzsimons Aff. ¶ 6. As these affidavits demonstrate, the reports would not have been commissioned but for the pending and anticipated litigation in which U S WEST was engaged. The motivation for the reports had nothing to do with issues arising in the ordinary course of U S WEST's business. Id. Under these circumstances, the documents clearly qualify for protection under the work product doctrine. See Martin, 150 F.R.D. at 172 (studies prepared after party is aware of potential for litigation squarely fall within work product privilege).[8]

ATMS allege without foundation that the studies were prepared "for ordinary business purposes" because, they argue, at the time U S WEST and its attorneys commissioned and prepared the studies, there was only a "remote possibility of litigation." Motion to Compel at 13-14. ATMS could not be further off the mark. The Telecommunications Act of 1996 requires non-discriminatory access to network elements, and the FCC previously determined that OSSs

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[8] ATMS's citation of Lumber v. PPG Indus., 168 F.R.D. 641, 646 (D. Minn. 1996) is inapposite. See Motion to Compel at 13. There, the court stated that a party could not shield documents from discovery by delegating business functions to outside counsel. Here, the affidavits of U S WEST counsel conclusively establish that the reports were not prepared in the ordinary course of business.

are a network element.[9] U S WEST's provision of non-discriminatory access to OSS was, at the time the OSS studies were commissioned, in litigation in 14 state public utility commissions and some number of federal courts. ATMS are each keenly aware of this litigation, as they are parties to most of the proceedings. In addition, U S WEST anticipated that AT&T, MCI and other interexchange providers would oppose its compliance in section 271 proceedings planned in other states, precisely as they have done in this proceeding. The litigation which prompted the OSS studies was real, ongoing, and immediate, as well as reasonably anticipated in other contexts.

ATMS's reliance on the Arizona Supreme Court's decision in Brown v. Superior Court, 137 Ariz. 327, 670 P.2d 725 (1983), is misplaced and their claim that "U S WEST has made no showing whatsoever that any information pertaining to the five factors[10] identified in Brown would establish that the documents were prepared in anticipation of litigation" is preposterous. Motion to Compel at 13-14. In Brown, the court held, in contrast to ATMS's position here, that the only materials not entitled to work product immunity were those prepared before the party claimed that it anticipated litigation -- the court held that all of the remaining materials, prepared after the date on which the party stated it anticipated litigation, were protected attorney work product. Brown, 137 Ariz. at 335-36, 670 P.2d at 733-34. All of the documents in question here were prepared in anticipation of litigation.

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[9] In AT&T Corp. v. Iowa Utils. Bd., 119 S. Ct. 721 (U.S. 1999), the United States Supreme Court vacated the FCC rule that defined the network elements incumbent local exchange carriers must unbundle under 47 U.S.C. §§ 251(c)(3) and 251(d)(2). Accordingly, there is currently no valid FCC rule defining the elements U S WEST must unbundle, nor is it clear whether the FCC will require incumbent LECs to unbundle OSS when it issues its new unbundling rules in response to the Supreme Court's decision.

[10] Although ATMS's listing of the factors set forth in Brown is generally accurate, see Motion to Compel at 12-13, as discussed below, however, their proposed application of those factors in this case is plainly erroneous.

More importantly, however, the sworn affidavits of Mr. Fitzsimons and Ms. Bennett clearly establish that the OSS studies at issue were prepared in anticipation of litigation under the factors listed in Brown. Mr. Fitzsimons and Ms. Bennett attest to the fact that the sole purpose of the OSS studies was to seek expert opinion and recommendations to assist lawyers in advising the company in connection with ongoing and anticipated litigation and administrative proceedings, including a show cause proceeding relating to U S WEST's OSS obligations before the Colorado Public Utilities Commission. See Fitzsimons Aff. ¶¶ 4, 6, & 11; Bennett Aff. ¶ 4. Indeed, that the studies were protected attorney work product created in anticipation of litigation is not casually asserted; it pervades the sworn affidavits of officers of the court. Fitzsimons Aff. ¶ ¶ 4,5,6,8,9,10,11,12; Bennett Aff. ¶ ¶ 3,4,5,6. In addition, each affidavit states that the studies were commissioned by counsel solely for litigation and were not prepared in the ordinary course of business. Fitzsimons Aff. ¶¶ 6 & 11; Bennett Aff. ¶ 4. Finally, because of their intimate involvement in the conduct of the testing and the rendering of the reports, the studies necessarily contain the attorneys' thought processes, conclusions and legal opinions regarding the requirements of the Act and U S WEST's OSS capabilities. See Fitzsimons Aff. ¶ 8; Bennett Aff. ¶ 4.[11]

ATMS claim that the OSS studies were prepared for an ordinary business purpose because they were undertaken to assess U S WEST's compliance with the Telecommunications Act . Motion to Compel at 14. This is simply a non-sequitur. U S WEST's compliance with the Act in its provision of OSS is a core issue in state arbitrations, cost dockets and federal court

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[11] This issue is well illustrated by Santiago v. Miles, 121 F.R.D. 636 (W.D.N.Y. 1988). In Santiago, an attorney developed a computer program to perform a statistical analysis of raw data to test the correlation of prison job assignments and ethnicity in anticipation of defense of a law suit. The court found that, although the raw data on computer printouts would not normally be protected by the work product doctrine, "the printouts themselves reflect, because of counsel's participation in developing the computer program, an attorney's 'selection process [which] itself represents defense counsel's mental impressions and legal opinions as to how the evidence in the documents relates to the issues and defenses in the litigation.'" Id. at 638 (quoting Sporck v. Peil, 759 F. 2d 312, 315 (3d Cir. 1985)).

litigations that were pending at the time the studies were commissioned. That OSS access may be required by the Act does not alter the fact that U S WEST's OSS compliance is a key issue in various litigated matters and it does not transform the purpose of the studies from litigation preparation to the ordinary course of business.

Accordingly, like the Montana and Nebraska commissions,, the Commission should hold that the documents at issue are protected from discovery by the work product doctrine.

2. The reports are opinion work product subject to the highest protection.

The reports also qualify for the higher protection that the law affords opinion work product. Mr. Fitzsimons' and Ms. Bennett's affidavits establish that they had significant involvement in the preparation of the reports. Because of their involvement, the reports reflect their opinions, legal theories, and litigation strategies. As discussed earlier, Mr. Fitzsimons had direct input into the methodology and scenarios the consultants selected for one of the studies, and he provided detailed, substantive comments on drafts of the other study in which he was involved. As a result, the reports contain and reflect his thought processes and legal strategies. Likewise, Ms. Bennett was intimately involved in deciding upon the nature and scope of the study she oversaw; the study, therefore, necessarily reflects her thought processes. Cf. Barrett Indus. Trucks, Inc. v. Old Republic Ins. Co., 129 F.R.D. 515, 519 (N.D. Ill. 1990) (defendant could not discover questions counsel asked consultant or even learn of aspect of case to which counsel directed majority of questions as that would reveal the attorney's thought processes).

Under the Arizona Rules of Civil Procedure, the mental processes, strategies and opinions of attorneys are afforded even greater protection than ordinary work product. See Ariz. R. Civ. P. 26(b)(3) (even if required showings are made and discovery is ordered, "court shall protect against disclosure of the mental impressions, conclusions, opinions, or legal theories of an attorney or other representative of a party concerning litigation"). As Rule 26(b)(3) expressly provides, this protection of "opinion work product" extends not only to attorneys, but also to

"other representatives of a party." Id.; 8 Charles A. Wright, Arthur R. Miller, Richard L. Marcus, Federal Practice and Procedure § 2026 at 403 (2d ed. 1994) ("the reference in the rule to 'representative' is consistent with cases that have refused to order discovery of material containing the impressions of claims agents and other assisting in preparation of the case") (emphasis added). Thus, the work product doctrine strictly protects not only the mental impressions of U S WEST's in-house counsel, but also those of its consultants as reflected throughout the reports where those consultants were retained in anticipation of litigation. Barrett Indus. Trucks, Inc., 129 F.R.D. at 519. The protection afforded opinion work product is near-absolute and cannot be overcome by a mere showing of need, or even an inability to secure equivalent materials without undue hardship. See Longs Drug Store, 134 Ariz. at 430, 657 P.2d at 418 ("Where the material being sought, however, contains nothing but impressions, theories and the like, there will ordinarily not be grounds for production"); Upjohn Co. v. United States, 449 U.S. 383, 399-401 (1981).

ATMS claim that U S WEST has made no showing that the reports contain the opinion work product of its consultants cannot be taken seriously in light of the affidavits of Ms. Bennett and Mr. Fitzsimons. See Motion to Compel at 14. The reports necessarily contain not only the opinions of U S WEST's attorneys, but also consultants' mental impressions, conclusions and opinions, and U S WEST asserts that the reports are protected on this ground as well. As Mr. Fitzsimons states: "Throughout the study period and based upon my experience as an in-house counsel for a large computer equipment and software manufacturer, I personally directed the consultant's efforts, and received status reports. I provided guidance on the particular methodology to be used to evaluate the OSS performance, and participated in the selection of scenarios for the simulation of actual system performance." Fitzsimons Aff. ¶ 8. Therefore, as Mr. Fitzsimons states, the OSS study reflects his legal opinions and conclusions. Id.

With respect to the September 1997 report, Mr. Fitzsimons states that he substantively commented on multiple drafts of the report. Id. ¶ 13. Thus, that report also contains his and the

consultants' mental impressions, conclusions and opinions. Similarly, in paragraph 4 of her affidavit, Ms. Bennett stated that the third study reflects her thought processes because she "worked closely with the consultants to develop the scope of the project." Thus, the affidavits provide evidence not only that the OSS studies were prepared in anticipation of litigation, but also that they contain legal opinions and not merely factual matter.

3. ATMS have not met their heavy burden of proving need.

Because the reports are opinion work product, ATMS may not discover them even if it could demonstrate need. But even if the reports could be discovered based on a showing of need, ATMS have not met their burden.

To discover non-opinion work product, ATMS have the burden of establishing that they have a substantial need for the reports and are unable to obtain substantially equivalent information by other means without undue hardship. See Ariz. R Civ. P. 26(b)(3); Hickman v. Taylor, 329 U.S. 495, 512 (1947); see also Longs Drug Stores, 134 Ariz. at 428, 657 P.2d at 416 (noting that "Arizona practice has always conformed to the Hickman rule" on these issues). ATMS cannot meet this heavy burden. It is well established that a party cannot obtain work product analyses of an adversary if the party has the ability to perform similar analyses itself or can obtain comparable information through other means. See Martin v. Bally's Park Place Hotel & Casino, 983 F.2d 1252, 1262-63 (3d Cir. 1993) (where OSHA had ability and resources to conduct own testing it could not obtain test report of defendant's consultant); Hendrick v. Avis Rent A Car Sys., Inc., 916 F. Supp. 256, 260-61 (W.D.N.Y. 1996) (plaintiff failed to establish substantial need to attend defendant's crash tests where did not demonstrate its own independent expert's attempts to perform similar tests); Martin, 150 F.R.D. at 173 (no substantial need shown where party could have performed own time and motion analysis in 1990, when defendant conducted its analysis, and could perform such analysis now); Juedeman v. Montana Deaconess Med. Ctr., 726 P.2d 301, 322-23 (Mont. 1986) (where plaintiffs could retain own pathologist to analyze records, exceptional circumstances warranting discovery of non-testifying expert

opinions is not present). Here, ATMS have access to IMA. Nothing prevents them from retaining their own consultants to evaluate the system. Moreover, they already have hundreds of pages of documents from U S WEST regarding IMA. These were provided pursuant to hundreds of data requests concerning OSS propounded by ATMS in this docket. Furthermore, ATMS have ample access to actual CLEC experience using IMA. With these other avenues available to them, it clearly would be improper to allow ATMS to exploit U S WEST's protected work product. See United States v. Beiersdorf-Jobst, Inc., 980 F. Supp. 257, 262 (N.D. Ohio 1997) (intent of work product doctrine is to prevent an adversary from piggybacking on the efforts of its opponent's counsel).

Based on vague and unsubstantiated claims of lack of "access" and "cooperation," ATMS assert that they cannot replicate the OSS studies and that, in any event, to do so would be an "arduous and unrealistic task." Motion to Compel at 16-17. ATMS do not explain why this is so. Just as U S WEST has, ATMS are free to retain their own experts and to elicit from those experts whatever they can in support of its opposition to U S WEST's section 271 compliance. And, as set forth above, they can obtain additional information through written discovery if the gateways are insufficient for their analytical purposes. DeBartolo-Aventura, Inc. v. Hernandez, 638 So. 2d 988 (Fla. App. 1994) (work product protection not overcome where plaintiff has standard discovery tools available to her).

While it is true that ATMS do not have unfettered access to U S WEST employees, that unavoidable circumstances is not reason to pierce attorney-client and attorney work product privileges. If it were, the privileges would be wholly diluted and largely unavailable to corporations. ATMS also claim that they should have access to the reports because the consultants prepared them early in the development of IMA when technical conditions were different from what they are now. See Motion to Compel at 17. This point, however, undermines rather than supports their position. Only the current version of IMA is relevant in this proceeding; thus, this argument does not establish "need." In fact, the OSS reports at issue

are so dated, and the changes to IMA since their preparation so substantial, ATMS cannot establish that the reports are even relevant, let alone that they are so "necessary" as to overcome applicable privileges and protections.

ATMS's reliance on Southern Bell is once again misplaced. In that case the withheld audits were simply raw data of over 1,000,000 trouble repair reports. There was no expert evaluation, consultant's opinion or recommendations to attorneys. It was not opinion work product as are the OSS studies here, nor did the audits reflect legal impressions and theories. Although the Florida Supreme Court held that the audits were work product, since they were not attorney-client privileged, overriding the work product protection in that case did not disclose privileged communications or reveal expert opinion, as it would here. The factual differences between Southern Bell and this case are so great as to make that case inapplicable. Under these circumstances, ATMS cannot overcome the protection to work product that Arizona Rule 26(b)(3) affords the documents at issue.

D. Arizona Rule of Civil Procedure 26(b)(4)(B) Prevents Discovery Regarding the Opinions and Conclusions of Non-Testifying Experts.

The reports are also immune from discovery because they were prepared by experts retained in anticipation of litigation, and who will not be called as witnesses in this proceeding. Rule 26(b)(4)(B) of the Arizona Rules of Civil Procedure provides:

> A party may through interrogatories or by deposition discover facts known or opinions held by an expert who has been retained or specially employed by another party in anticipation of litigation or preparation for trial and who is not expected to be called as a witness at trial, only as provided in Rule 35(b) [relating to physical or mental examinations] or upon a showing of exceptional circumstances under which it is impracticable for the party seeking discovery to obtain facts or opinions on the same subject by other means.

Many courts have affirmed the principle of precluding discovery of such expert reports absent exceptional circumstances. See Durflinger v. Artiles, 727 F.2d 888 (10th Cir. 1984); Wolt v. Sherwood, 828 F. Supp. 1562, 1566-68 (D. Utah 1993); see also Hartford Fire Ins. Co. v. Pure Air on the Lake, Ltd., 154 F.R.D. 202, 207-10 (N.D. Ind. 1993); In re Shell Oil Refinery, 132

F.R.D. 437 (E.D. La. 1990). Indeed, Arizona courts have long recognized that the rule "distinguishes sharply between testimonial and consulting experts, prohibiting discovery from the latter except 'upon a showing of exceptional circumstances.'" Emergency Care Dynamics, Ltd. v. Superior Court, 188 Ariz. 32, 36, 932 P.2d 297, 301 (Ct. App. 1997) (also noting Rule 26(b)(4) "imposes a substantial barrier against discovery from consulting experts").

As set forth above, nothing precludes ATMS from retaining their own experts to evaluate U S WEST's OSSs. Since they are free to do so, ATMS cannot meet the heavy burden of proving exceptional circumstances warranting disclosure of the reports. See, e.g., Hartford Fire Ins. Co., 154 F.R.D. at 208-10 (no exceptional circumstances where plaintiffs' experts had ample opportunity to conduct their own analysis of collapsed pipes); In re Shell Oil Refinery, 132 F.R.D. at 443 (no exceptional circumstances where plaintiffs' experts could conduct tests plaintiffs sought to obtain from defendants' non-testifying experts); see also In re Pizza Time Theatre Sec. Litig., 113 F.R.D. 94, 96 (N.D. Cal. 1986) (privilege is designed "to discourage lazy or unscrupulous lawyers from trying to cut case-preparation corners by leaching basic information or valuable opinions from experts retained by their opponents"). Instead, ATMS have demonstrated no interest in implementing IMA and have abandoned entirely implementation of U S WEST's EDI operational support system.

The non-testifying expert privilege is designed to prevent a party from unfairly taking advantage of the work and effort undertaken by another. See In re Pizza Time Theatre Sec. Litig., 113 F.R.D. at 96. ATMS have the resources, ability and opportunity to conduct their own investigations on these issues. This Commission should not destroy U S WEST's privileges and protections simply to relieve ATMS of the standard burdens of case preparation.

E. The Documents are Protected Under the Self-Evaluation Privilege.

Even if the long-standing attorney-client privilege and the attorney work-product and non-testifying expert doctrines did not apply, the corporate self-evaluation privilege would protect these documents from disclosure.

Numerous courts have recognized the corporate self-evaluation privilege. See, e.g., Joiner v. Hercules, Inc., 169 F.R.D. 695- 698-99 (S.D. Ga. 1996); Sheppard v. Consolidated Edison Co., 893 F. Supp. 6, 7-8 (E.D.N.Y. 1995); Reichold Chems., Inc. v. Textron, Inc., 157 F.R.D. 522 (N.D. Fla. 1994); In re Crazy Eddie Sec. Litig., 792 F. Supp. 197, 205 (E.D.N.Y. 1992). The privilege permits individuals and corporations to assess candidly their compliance with legal or regulatory requirements without creating evidence that may be used by opponents in future litigation. Reichold Chems., 157 F.R.D. at 524. Courts reason that self-evaluation fosters compliance with the law and, thus, serves a compelling public interest. See Sheppard, 893 F. Supp at 7 ("The self-evaluation privilege is based on the notion that disclosure of documents reflecting candid self-examination will deter or suppress socially useful investigations or evaluations or compliance with the law or professional standards") (quoting Reilly v. Metro-North Commuter R.R. Co., No. 93 Civ. 7317, 1995 WL 105286, *1 (S.D.N.Y. Mar. 13, 1995)).

To suggest that the corporate self-analysis privilege is barred by Arizona law, ATMS cite a district court case from Kansas, Mason v. Stock, 869 F. Supp. 828 (D. Kan. 1994). AT&T Supplemental Memo at 3 n.1. This case is wholly inapposite. First, the court in Mason considered a "self-policing' privilege asserted by law enforcement officers that was distinct from the corporate self-critical analysis privilege asserted here. Id. at 834. Second, the court's initial ground for rejecting the privilege was federalism concerns – specifically, the need for a federal court to avoid creating common law. Id. Third, the case involved federal civil rights violations allegedly committed by law enforcement officers. The court was simultaneously concerned about allowing state officials to shield themselves from federal civil rights statutes, and leery of the idea that policemen would somehow shirk their normal duties without access to the privilege. Id. The cases ATMS ascribe to Judge Weinstein for additional support of its position also involves law enforcement officers – and similar issues. Denver v. Lichtenstein, 660 F.2d 432 (10th Cir. 1981).

To assert the self-analysis privilege, a party generally must meet a four-part test: (1) the information must result from critical self-evaluation undertaken by the party seeking protection; (2) there must be a strong public interest in preserving the free flow of the type of information sought; (3) the information must be of a type whose flow would be curtailed if the privilege did not apply; and (4) the information must be prepared with the expectation that it would be kept confidential. Dowling v. American Hawaii Cruises, Inc., 971 F.2d 423, 425 (9th Cir. 1992). The documents U S WEST seeks to withhold easily satisfy each of the four factors.

First, the reports result from, at a minimum, critical self-evaluation that U S WEST initiated of its OSS systems. Second, the public has a strong interest in encouraging ILECs like U S WEST to conduct such analyses in order to foster competition in the local telephone market and to satisfy its OSS obligations under the Act. Indeed, this Commission has a particularly strong interest in encouraging U S WEST to conduct such analyses so that U S WEST may assess its satisfaction with the Act before seeking to enter the long-distance telephone market in Arizona. Third, if these reports are not privileged, U S WEST and other utilities will be strongly discouraged from conducting similar analyses in the future. If its competitors can discover these analyses, U S WEST will clearly have no incentive to conduct them in the future. Finally, as noted above, U S WEST has strictly protected the confidentiality of the reports, permitting only U S WEST counsel and a limited number of employees directly involved in OSS compliance to have access.

U S WEST seeks simply to preserve its legal rights, and to prevent the forced disclosure of information that is protected by well-settled, cognizable legal privileges. The Commission should resist AT&T's efforts to compel discovery of what is clearly confidential and privileged information.

IV. Conclusion

For the foregoing reasons, the Commission should reject ATMS's motion to compel responses to data requests JI-130, JI-131, JI-132, and JI-133 from U S WEST.

DATED this 24th day of May, 1999.

Respectfully submitted,

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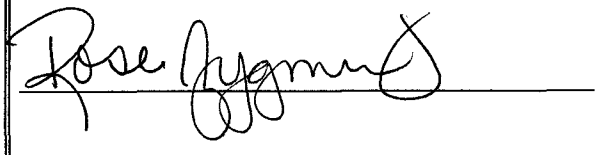

BEFORE THE ARIZONA CORPORATION COMMISSION

IN THE MATTER OF U S WEST COMMUNICATIONS, INC.'S COMPLIANCE WITH SECTION 271 OF THE TELECOMMUNICATIONS ACT OF 1996	**Docket No. U-0000-97-238**

U S WEST COMMUNICATION, INC.'S OPPOSITION TO THE MOTION OF AT&T COMMUNICATIONS OF THE MOUNTAIN STATES, INC., TCG-PHOENIX, MCI WORLDCOM, INC., AND SPRINT COMMUNICATIONS COMPANY, L.P., TO COMPEL RESPONSES TO DATA REQUESTS JI-130, JI-131, JI-132 AND JI-133

Exhibits and Other Attachments

Exhibits

A.	Affidavit of Laurie J. Bennett
B.	Affidavit of Raymond C. Fitzsimmons
C.	September 4, 1998 and October 30, 1998 Decision of Montana Special Master
D.	August 14, 1998 Decision of Nebraska Special Master

Relevant Statutory Provisions

A.R.S § 12-2234

Selected Case Authority

United States v. Kovel, 296 F. 2d 918 (2d Cir.1961)

Longs Drug Stores v. Howe, 134 Ariz. 424, 657 P.2d 412 (1983)

Santiago v. Miles, 121 F.R.D. 636 (W.D.N.Y. 1988)

Exhibit A.

Affidavit of Laurie J. Bennett

AFFIDAVIT OF LAURIE J. BENNETT

CITY AND COUNTY OF DENVER)
) ss.
STATE OF COLORADO)

Laurie J. Bennett, being sworn, deposes and says:

1. I am over the age of twenty-one and am competent to testify to the facts set forth in this affidavit.

2. From February 1986 to July 1998, I was employed as an attorney by U S WEST, Inc. I now provide legal consulting services to U S WEST on a periodic basis.

3. While I was an employee with U S WEST, in preparation for proceedings before state public utility commissions and the FCC under section 271 of the Telecommunications Act of 1996, the U S WEST Law Department engaged a firm to undertake analyses of the issues U S WEST would face when it files petitions pursuant to section 271, with a focus on OSS issues. Two contracts reflecting this engagement were entered into in the Summer and Winter of 1997.

4. I commissioned these analyses for use in preparing for proceedings under section 271 of the Act. I requested the analyses solely because of anticipated litigation, not because of issues arising in the ordinary course of U S WEST's

I declare under penalty of perjury that the foregoing is true and correct to the best of my knowledge and belief.

DATED this 20th day of May, 1999.

Laurie J. Bennett

SUBSCRIBED AND SWORN to before me this 20th day of May, 1999, by Laurie J. Bennett.

Witness my hand and official seal.

My commission expires: May 8, 2000

(SEAL)

Notary Public

business. I was the contact person with respect to the project, and I had the principal role in communicating with the firm. I also worked closely with the consultants to develop the scope of the project, and the study, therefore, reflects my thought processes.

5. I explained to the manager of the project the confidential nature of any studies or materials that would be created, and that they were to be used to prepare for litigation relating to section 271 of the Act. All written analyses that were presented to U S WEST bore the inscription "Prepared in Anticipation of Litigation - Attorney Client Privilege." I in fact used the analyses to formulate legal advice. Furthermore, the written analyses reflect the mental impressions, thought processes, opinions and conclusions of the consultants regarding the section 271 and OSS issues they were retained to analyze.

6. No final reports were ever produced or disseminated. All drafts have been kept confidential, pursuant to my direction, and shown only to a small number of people who were working on section 271 issues.

Exhibit B

Affidavit of Raymond C. Fitzsimmons

DEPARTMENT OF PUBLIC SERVICE REGULATION
BEFORE THE PUBLIC SERVICE COMMISSION
OF THE STATE OF MONTANA

IN THE MATTER OF The Investigation into U S WEST Communications, Inc.'s Compliance with Section 271 of the Telecommunications Act of 1996	UTILITY DIVISION DOCKET NO. D97.5.87

AFFIDAVIT OF RAYMOND C. FITZSIMONS

CITY & COUNTY OF DENVER)
) ss.
STATE OF COLORADO)

Raymond C. Fitzsimons, being sworn, deposes and says:

1. I am over the age of twenty-one and am competent to testify to the facts set forth in this affidavit.

2. I am an attorney employed by U S WEST, Inc. (U S WEST) in the U S WEST Law Department. My titles are Assistant General Counsel - Litigation; and Executive Director - Productivity & Technology Management.

3. In July 1997, I began advising U S WEST's Information Technology organization addressing Operational Support Systems (OSS) issues. My role in this project was to advise U S WEST as to issues which could arise under the Telecommunications Act of 1996 (the Act) and to advocate positions on OSS issues in various litigations.

4. U S WEST is involved in litigation throughout its fourteen state service area concerning these matters. Since the passage of the Act, lawsuits have been filed in the state and federal courts of Colorado, Arizona, Washington, Iowa, Minnesota, Nebraska, and New Mexico. Each of these lawsuits concerned legal issues relating to OSS access. For example, I defended U S WEST in a show cause proceeding initiated by the Colorado Public Utilities Commission dated September 30, 1997 (Docket 97C-432T), alleging that U S WEST had failed to meet its OSS obligations under the Act.

5. U S WEST is also involved in contested hearings before state public utility commissions relating to matters that arise under the Act. These matters include arbitrations and cost proceedings with telecommunications companies that have sought to interconnect with U S WEST's telephone network. These matters also include proceedings under section 271 of the Act in which U S WEST is seeking certification to enter the long-distance telephone market. By the Summer of 1997, U S WEST was considering initiating proceedings under section 271. U S WEST has long anticipated that there will be subsequent litigation in most, if not all, of these states regardless of the outcome of these hearings.

6. In October 1997, I commissioned a study of the performance of U S WEST's OSS system for use by U S WEST counsel in defending the various lawsuits that involve this issue, and in preparing for proceedings under section 271 of the Act. I commissioned the study for purposes of rendering legal advice to U S WEST in connection with litigation then pending against U S WEST and to permit legal analysis in connection with section 271. Specifically, I anticipated that U S WEST would use the study to develop responses to claims by AT&T, MCI, and other competitive local exchange carriers that U S WEST was not

complying with the Act. I commissioned the study solely for litigation, not because of issues arising in the ordinary course of U S WEST's business.

7. From the outset, I told the consulting team that the study was highly confidential, that it was commissioned to enable U S WEST to assess and defend its OSS performance for use in pending and anticipated litigation, and that the final work product must only be provided to the U S WEST Law Department. These requirements were imposed in order to maintain the privileged nature of results of the study.

8. Throughout the study period and based upon my experience as an in-house counsel for a large computer equipment and software manufacturer, I personally directed the consultant's efforts, and received status reports. I provided guidance on the particular methodology to be used to evaluate the OSS performance, and selected scenarios for the simulation of actual system performance. The study and its results therefore contain my thought processes, opinions, and conclusions regarding the requirements of the Act and issues raised in pending and anticipated litigation concerning U S WEST's OSS performance.

9. This study was completed in May 1998. A single copy of the preliminary draft was sent to me. A single copy of the final report was delivered to Laura Ford, an attorney who succeeded me on the OSS project. The cover and each page of the report contain the legend Privileged - Attorney/Client Correspondence Prepared in Anticipation of Litigation. The report reflects and contains the mental impressions, conclusions and opinions of the consultant retained to assist U S WEST in anticipation of litigation.

10. Since receiving the report, U S WEST has maintained its confidentiality by strictly limiting access to it to counsel for U S WEST and a small group of employees directly and intimately involved in OSS issues. I have used, relied upon, and continue to use and to

rely upon the report in rendering legal advice to U S WEST regarding pending and anticipated litigation. To the best of my knowledge, the results of the study have not been revealed to anyone that was not intimately and directly involved in litigation concerning U S WEST's OSS performance.

11. U S WEST's Information Technologies organization commissioned another analysis in September 1997. In mid-1997, U S WEST employees from that organization were working closely with me and other U S WEST lawyers to assist in defending the pending claims relating to U S WEST's OSS performance and in preparing for the section 271 proceedings. To that end, they requested another consulting firm to evaluate issues surrounding U S WEST's OSS systems obligations and to assess any litigation risks associated with them. Their request for the evaluation arose solely in the context of litigation, not in the ordinary course of U S WEST's business.

12. Because this study was requested specifically for potential use in litigation, the Information Technologies organization consulted with me concerning the steps to take to ensure that the study would be confidential. Based on my advice, the consulting team involved in the project was instructed that the study was confidential and that information relating to it should not be disclosed to anyone other than the U S WEST employees who also were directly involved.

13. I monitored the preparation of the report and reviewed two drafts before the consultants issued the final report in October 1997; I provided substantive comments to both drafts. The consulting firm was fully aware that U S WEST intended to use the report in connection with litigation. Accordingly, each page of the final report is marked with the legend: "Confidential Attorney/Client Privilege -- Attorney Work Product." The consulting

firm produced only two copies of the report to U S WEST: one was sent to me as litigation counsel for U S WEST and the other to the employee in the Information Technologies organization who had consulted with me about the project. The report contains and reflects the mental impressions, opinions, and conclusions of the consulting firm regarding the issues they were retained to analyze.

14. U S WEST has maintained the confidentiality of this report, disclosing it only to counsel and a small group of employees directly involved in the Colorado litigation concerning OSS performance issues.

I declare under penalty of perjury that the foregoing is true and correct to the best of my knowledge and belief.

DATED this 8 day of July, 1998.

Raymond C. Fitzsimons

SUBSCRIBED AND SWORN to before me this 8 day of July, 1998, by Raymond C. Fitzsimons.

Witness my hand and official seal.

My commission expires: _____

(SEAL)

Notary Public

LOURDES SANCHEZ
NOTARY PUBLIC
STATE OF COLORADO
My Commission Expires 12/02/2000

Exhibit C

September 4, 1998 and October 30, 1998
Decision of Montana Special Master

DEPARTMENT OF PUBLIC SERVICE REGULATION
BEFORE THE PUBLIC SERVICE COMMISSION
OF THE STATE OF MONTANA

*****

IN THE MATTER of the Investigation into U S WEST Communications, Inc.'s Compliance with Section 271(c) of the Telecommunications Act of 1996.	))))	UTILITY DIVISION DOCKET NO. D97.5.87

SECOND DECISION OF SPECIAL MASTER ON DISCOVERY ISSUE

1. On October 15, 1998, AT&T Communications of the Mountain States, Inc. (AT&T), filed a Motion for Compliance with Discovery Order. In its motion AT&T questions whether U S West Communications, Inc. (USW), has complied with the Public Service Commission's (PSC) September 11, 1998, Order on Reconsideration of Order Compelling Discovery, PSC Order No. 5982h, which adopted the September 4, 1998, Decision of Special Master on Discovery Issue (previous order). On October 22, 1998, USW filed a Response to AT&T's Motion for Compliance with Discovery Order. In its response USW supplements one of the data responses at which AT&T's motion is directed, but argues that the remaining USW data responses and USW objections in lieu of data responses are in compliance with the previous order. The PSC has appointed the undersigned as a special master to decide the matter.

2. AT&T states that the previous order requires USW to respond to joint intervenor data requests numbered JI-018(a), (b), (c), and (d), and JI-048(b), (c), and (d). These data requests pertain to information regarding three USW operational support systems (OSS) studies and, in part, request USW to identify the objectives and the results of the studies. A third data request, JI-244, is also involved, but it merely pertains to updates to the data requests in issue and need not be discussed separately. In its motion AT&T argues that the previous order requires narrative responses by

USW. AT&T notes that USW has supplied narrative responses to JI-018 (in part) and JI-048(b) and (c), but the remaining USW data responses, JI-018 (in remaining part) and JI-048(d), are not in narrative form, are simply a collection of print-outs, and include nothing responsive or identifying either the objectives or results of USW's OSS studies or any other analysis of USW's OSS.

3. In response to AT&T's motion USW includes a supplement to USW's previous responses to JI-018. Review of the supplement, as well as previous USW responses to JI-018, demonstrates that USW has now responded regarding all objective-related aspects of JI-018. Review also demonstrates that USW has responded to the result-related aspects of JI-018, except for identifying the results of certain interface testing pertaining to one of the three USW OSS studies (regarding the other two studies USW has responded that no tests were conducted). Pertaining to the remaining result-related data requests (i.e., JI-018(d), one study, and JI-048(d), all three studies) USW argues that it has produced all information required by the previous order and all remaining information which would be responsive to the identified data requests is privileged in accordance with the previous order. USW argues that it has responded completely and directly to all fact-specific data requests in this docket and has not withheld responses to such data requests on the grounds that the information is in the possession of attorneys or non-testifying consultants. USW argues it is not required by the previous order or discovery rules in general to extract facts from privileged report information and assemble those facts into a non-privileged format (e.g., AT&T's requested narrative response). USW has cited to one case wherein a federal court has held that it would not require extraction and production of facts from privileged documents because it is often impossible to separate the facts from the privileged information. Medical Waste Technologies v. Alexian Brothers Medical Center, Cause No. 97 C 3805 (N.D. Ill., 1998).

4. Given the above, it appears the issue for this special master decision is whether USW is required to provide narrative responses to the result-related data

requests, JI-018(d) (results of interface testing regarding the one study wherein tests were conducted) and JI-048(d) (the concerns, problems, and deficiencies identified during each of the three studies). The previous order held that facts underlying the studies or related documents which qualify as mental impressions, conclusions, opinions, or legal theories of USW's attorneys or other representatives, or which qualify as facts known or opinions held by non-testifying experts are not discoverable. All other facts underlying privileged communications were held discoverable. Pertaining specifically to data request JI-018(d) and JI-048(d), the previous order held that the requests pertain to facts underlying privileged communications and such facts are not privileged, but specifically noting that it is more than probable that the requested USW OSS study results will include opinion work product and facts known and opinions held by non-testifying experts. The previous order required USW to supply the requested information, but in a format that does not include the mental impressions, conclusions, opinions, or legal theories of its attorneys or other representatives.

5. This special master intended through the previous order that USW be required to respond to JI-018(d) and JI-048(d) in some fashion clearly communicating the requested information, but protecting privileged information. A narrative response was not directed, but a narrative response seems to be the most suitable format for responding and protecting privileged information at the same time. An important qualification intended by this special master and implied in the previous order, is that USW be required to respond only if a meaningful response could be developed without divulging the protected mental impressions, conclusions, opinions, or legal theories of USW's attorneys or other representatives. It would be meaningless for USW to attempt to extract, reassemble, and supply facts from USW's OSS studies if those facts could not be readily understood without having access to the related privileged information. That might be what has occurred in USW's most recent effort to respond to the data requests in issue. The *in camera* review preceding the previous order did not focus on whether it would be impossible for USW to formulate a meaningful response without

divulging privileged information. However, the *in camera* review was sufficient to determine that impossibility could be the case.

6. In any event, it was intended by this special master, and possibly should have been more directly stated in the previous order, that the impossibility of USW providing a meaningful response without divulging privileged information is a possibility. Nevertheless, it is unclear whether USW is in compliance with the previous order regarding responses to the result-related data requests. In one regard USW appears to argue that it is not required by the previous order or discovery rules in general to extract facts from privileged documents and assemble and provide those facts in a format that protects privileged information. However, the previous order requires USW to do exactly that (i.e., extract facts from the reports and provide those facts in response to the data requests), if a meaningful response can be provided without divulging the privileged aspects within the documents. In another regard USW generally indicates that it has attempted to determine whether it is possible to assemble and convey a response without divulging privileged information and it has provided a collection of documents which are apparently intended to be responsive.

7. It is this special master's decision to disagree with the only case law or law of any nature cited by either party in support of the present arguments -- USW's cited Medical Waste Technologies, *supra*. The privileges and resulting protection of information provided USW to date should not be expanded to encompass additional facts merely because it often is impossible to separate those facts from privileged information. What needs to be known is whether it actually is impossible in the present instance. Therefore, if USW has not done so already, USW must review its OSS studies and related documents, determine whether facts pertinent to the results (e.g., identified concerns, problems, or deficiencies) can be assembled into a format clearly communicating a readily understandable narrative response without divulging protected information. If USW can assemble such response it must do so and provide it. If USW determines that it is impossible to assemble such response it should so state, with

reasons (brief) why such is the case, in lieu of response. This special master fully understands that this decision relies on a good faith effort by USW. Nothing known to this special master indicates that USW will not make such effort, if USW has not done so already.

Dated this 30th day of October, 1998.

Martin Jacobson
PSC-Appointed Special Master

Service Date: November 6, 1998

DEPARTMENT OF PUBLIC SERVICE REGULATION
BEFORE THE PUBLIC SERVICE COMMISSION
OF THE STATE OF MONTANA

* * * * *

IN THE MATTER of the Investigation into U S WEST Communications, Inc.'s, Compliance with Section 271(c) of the Telecommunications Act of 1996.	))))	UTILITY DIVISION DOCKET NO. D97.5.87 ORDER NO. 59821

ORDER ADOPTING SECOND DECISION OF SPECIAL MASTER ON DISCOVERY ISSUE

AT&T Communications of the Mountain States, Inc. (AT&T) has filed a Motion for Compliance with Discovery Order, requesting that the Public Service Commission (PSC) appoint the same special master authoring the September 4, 1998, Decision of Special Master on Discovery Issue to determine if U S West Communications, Inc. (USW), is in compliance with that decision. USW has filed a response to AT&T's motion. The PSC has appointed the special master to rule on the matter. The special master submitted a ruling to the PSC on October 30, 1998.

IT IS HEREBY ORDERED that the PSC adopts the October 30, 1998, Second Decision of Special Master on Discovery Issue (copy attached) as the PSC's Order on AT&T's motion.

Done and dated this 30th day of October, 1998, by a vote of 5-0.

BY ORDER OF THE MONTANA PUBLIC SERVICE COMMISSION

DAVE FISHER, Chair

NANCY MCCAFFREE, Vice Chair

BOB ANDERSON, Commissioner

BOB ROWE, Commissioner

DANNY OBERG, Commissioner

ATTEST:
Kathlene M. Anderson
Commission Secretary

(SEAL)

NOTE: Any interested party may request the Commission to reconsider this decision. A motion to reconsider must be filed within ten (10) days. See 38.2.4806, ARM.

MONTANA PUBLIC SERVICE COMMISSION

CERTIFICATE OF SERVICE

* * * * * *

I hereby certify that a copy of an ORDER ADOPTING SECOND DECISION OF SPECIAL MASTER ON DISCOVERY ISSUE, ORDER NO. 5982i, in Docket No. D97.5.87, in the matter of PSC INVESTIGATION INTO USWC'S COMPLIANCE WITH SECTION 271 (c) OF THE TELECOMMUNICATION ACT OF 1996, dated October 30, 1998, has today been served on all parties listed on the Commission's most recent service list, updated 11/5/98, by mailing a copy thereof to each party by first class mail, postage prepaid.

Date: November 6, 1998

Rachel Thompson
For The Commission

Intervenors

Montana Consumer Counsel
Montana Department of Administration, Information Services Bureau
Eclipse Communications Corp.
AT&T Communications of the Mountain States, Inc.
ICG Telecom Group, Inc.
MCI Telecommunications Corporation
McLeod, USA, Inc.
Montana Independent Telecommunications Systems
Montana TEL-NET
Northwest Payphone Association
Skyland Technologies, Inc.
Sprint Communications Company L.P.
Telecommunications Resellers Association
Touch America
Ronan Telephone Company
Hot Springs Telephone Company
Montana Telephone Association (withdrew)
Teleport Communications Group, Inc.

DEPARTMENT OF PUBLIC SERVICE REGULATION
BEFORE THE PUBLIC SERVICE COMMISSION
OF THE STATE OF MONTANA

*****

IN THE MATTER of the Investigation into U S WEST Communications, Inc.'s Compliance with Section 271(c) of the Telecommunications Act of 1996.	))))	UTILITY DIVISION DOCKET NO. D97.5.87

DECISION OF SPECIAL MASTER ON DISCOVERY ISSUE

I. INTRODUCTION

1. On August 6, 1998, the Public Service Commission (PSC) issued Order No. 5982f in the above-entitled matter, appointing the undersigned as special master to decide a pending discovery issue. The issue involves discovery rules pertaining to the attorney-client privilege, ordinary work product, opinion work product, and non-testifying experts. In some instances, and the present instance is one of those, proper application of these rules requires a review of the discovery-requested information. The PSC's appointment of the special master, legally required or not, should reduce or eliminate any fact-finder tainting concerns that might exist if the PSC itself, as ultimate fact finder in the proceeding, were to review the materials directly, especially if following review of the information the PSC determined the information is not discoverable.

2. In general terms, the discovery issue is whether certain U S West Communications, Inc. (USW), operational support systems (OSS) studies or reports, documents related to those studies (e.g., memoranda, contracts), and other information pertaining to the studies (e.g., names of consultants engaged, methodologies applied in the studies) are discoverable. The discovery issue arises from data requests (the primary method of discovery in PSC contested case proceedings, ARM 38.2.3301)

directed to USW by joint intervenors in the proceeding. With a few exceptions the data requests in issue remain unanswered by USW. The disagreement as to whether USW must respond to the data requests appears to be primarily between USW and AT&T Communications of the Mountain States, Inc. (AT&T), one of the joint intervenors.

3. The issue is now on reconsideration before the PSC. In May 1998, and again in June 1998, AT&T filed a motion to compel USW responses to certain joint intervenor data requests, including the several data requests pertaining to USW's OSS studies and now in issue. On June 29, 1998, the PSC issued Order No. 5982e, granting AT&T's motion. USW has requested that the PSC reconsider Order 5982e insofar as it compels USW responses to the data requests pertaining to USW's OSS studies. Arguments on reconsideration, written and oral, have been submitted by USW and AT&T. USW has provided copies of the OSS studies and related documents for an *in camera* review by the special master.

II. DISCUSSION

A. FACTS

4. The PSC commenced the above-entitled matter for the purpose of obtaining information that might assist the PSC in its anticipated fact-finding and consultative role before the Federal Communications Commission (FCC), when USW files with that federal agency for a determination regarding whether USW's telecommunications system is open to and capable of administering local competition and whether USW should be allowed to compete in providing certain long distance telecommunications services. The status of USW's OSS will be an important consideration in the FCC's decision. Therefore, that status is an important consideration for the PSC, in regard to the PSC's anticipated role before the FCC. The status is also an important consideration for AT&T and other intervenors (many being competitive long distance carriers and potential competitors of USW as local exchange carriers) in their participation in the present proceeding before the PSC and in the future

proceeding before the FCC.

5. USW is a public utility providing regulated telecommunications service in Montana and other western states, primarily as a local exchange carrier. USW is a corporation. It has an internal corporate structure that includes a law department staffed by attorneys who are employed by USW. Its internal corporate structure also includes other departments, with various functions, staffed by employees of USW. At times USW also engages attorneys and consultants through contract.

6. Several data requests (numbered JI-018, JI-048, and JI-049) directed to USW by the joint intervenors in the proceeding are involved in the issue now before the PSC. Data request JI-018 requests information related to USW's OSS studies, including dates, objectives, methodologies used, and results of certain interface testing. USW has, at least to some extent, responded to JI-018 regarding the objectives and methodologies aspects, but not otherwise. Data request JI-048 requests information related to USW's OSS studies, including the consultant engaged, date engaged, beginning and ending dates of the review, and a description of concerns, problems, and deficiencies identified during the studies. USW's response to JI-048 is an objection based on the attorney-client privilege and attorney work product. Data request JI-049 requests production of USW's OSS studies and related documents. USW's response to JI-049 is the same as its response to JI-048 (i.e., an objection).

7. USW has submitted affidavits of two attorneys employed, at all times relevant, by USW as members of USW's law department and assigned by USW to the projects which generated the discovery-requested information now in issue before the PSC. One attorney is Raymond C. Fitzsimons and the other is Laurie J. Bennett. The Fitzsimons affidavit references a third attorney, Laura Ford, also a member of USW's law department, who succeeded Fitzsimons in regard to one or more of the USW OSS projects.

8. It is possible that one or more of the above-named attorneys may act in more than one capacity on behalf of USW (e.g., the Fitzsimons affidavit discloses his

Job titles as "Assistant General Counsel – Litigation" and "Executive Director – Productivity and Technology Management"). However, the above-named attorneys were acting in the capacity of attorneys for USW when involved with the information now in issue before the PSC.

9. Fitzsimons states (through affidavit) that he commissioned one performance study of USW's OSS system for the purpose of permitting legal analysis and rendering legal advice to USW and not for a purpose in the ordinary course of USW's business. He states the study was designated and maintained as confidential and provided only to USW's law department. Fitzsimons states that he directed the consultants' efforts in regard to the study and provided guidance to the consultants and the study therefore includes his thought processes, opinions, and conclusions. He also states that the study reflects and contains the mental impressions, conclusions, and opinions of the consultants retained. Fitzsimons states that he has used and relied on the study to render legal advice to USW. He states that the study has remained confidential.

10. Fitzsimons also states (through affidavit) that he was involved as USW's attorney regarding another OSS-related performance study commissioned by USW's Information Technologies Organization, members of which worked closely with him to defend pending claims. Fitzsimons states that this second study was also prepared solely for legal purposes and not for purposes in the usual course of USW's business. He states that he monitored the preparation of the study and reviewed and commented at the draft stages. He states that the study, one copy provided to him and one copy provided to USW's Information Technologies Organization, was designated and maintained as confidential and has remained confidential. He also states that the study reflects and contains the mental impressions, conclusions, and opinions of the consultants retained.

11. Bennett states (through affidavit) that she commissioned a consulting firm to perform analyses of § 271 of the federal Telecommunications Act of 1996, with the

focus on OSS matters. She states that the purpose of engaging the firm was solely for preparation of proceedings before federal and state authorities and anticipated litigation and was not for any purpose in the ordinary course of USW's business. Bennett states that she was the USW contact person for purposes of the study and had the principal role in communicating with the consultants. She states that she worked closely with the consulting firm to develop the scope of the project and the study therefore reflects her thought processes. Bennett states that the study and materials created have been designated and maintained as confidential. She states that the analyses in the study have been used to formulate legal advice. She states that the analyses reflect the mental impressions, thought processes, opinions, and conclusions of the consultants. Bennett states that the project produced several drafts, but no final study.

12. Fitzsimons's and Bennett's above-referenced consultant analyses, in the form of final or draft studies, and documents related to them are the information USW has submitted for *in camera* review. Factually, the studies and related documents are what USW claims them to be and what the USW attorney affidavits describe them to be. They are OSS studies, they are commissioned by USW, they are performed and prepared by consultants, and they and all parts of them, and for the most part each of their pages, are clearly marked in some fashion indicating that they are in anticipation of litigation and are attorney-client privileged. The studies include mental impressions, thought processes, opinions, and conclusions. The documents related to the OSS studies are contracts, memoranda, and other communications between or among USW, USW's law department, and the consultants engaged to perform the studies.

13. The affidavits, studies, and related documents evidence USW's law department being at the center of all study-related events – USW communicated to its law department requesting legal advice, USW's law department engaged the consultants on USW's behalf or directed USW's engagement of the consultants, the consultants performed the requested studies, USW's law department communicated with the consultants regarding development and direction of the studies, the consultants

directed the product of their efforts to USW's law department, and USW's law department communicated to USW regarding legal advice. Also regarding all study-related events the affidavits, studies, and related documents evidence that USW's law department and certain USW technical or consulting staff worked together, but, again, USW's law department remained at the center of the process. USW's technical and consulting staff, as well as the consultants engaged, provided subject matter expertise to USW's law department. The OSS studies and related documents include information USW's law department would find important, if not indispensable, in providing legal advice to USW.

14. The connection of the studies and related documents to actual (i.e., then pending) litigation is vague by way of USW's attorney affidavits. The information made available for *in camera* review strengthens the connection in regard to at least one of the studies. However, the connection of the studies and related documents to anticipated litigation is reasonably clear by affidavit and is fully supported through *in camera* review. Furthermore, given the subject matter of the information in issue and its direct relationship to substantial changes occurring in the telecommunications industry and regulation of that industry, it would seem unreasonable for USW to have anticipated anything less than a one hundred percent chance of litigation, of one kind or another. In any event, in regard to the purpose of the studies much more than a remote possibility of litigation existed at all times relevant.

B. LAW

Summary of Arguments

15. USW argues that long-established privileges and related legal rights allow persons to freely and confidentially consult with their attorneys, including as such consultations might involve the results of attorney investigations assisted by others providing subject matter expertise (e.g., consultants). USW argues that the PSC's order compelling USW's disclosure of the information in issue violates applicable

privileges and related legal rights as those are provided by Montana law at: § 26-1-803, MCA, the attorney-client privilege; Rule 26(b)(3), M.R.Civ.P., discovery and the attorney work product; and Rule 26(b)(4)(B), M.R.Civ.P., discovery and non-testifying experts.

16. AT&T argues that the PSC has fully and properly addressed all of the issues through Order No. 5982e (PSC order granting AT&T's motion to compel) and USW has not presented a factual or legal basis demonstrating that the PSC's action should be reconsidered. AT&T argues that the attorney-client privilege, to the extent it might be applicable, protects communications not the underlying facts; and, to the extent that such facts might be subject to protection as work product, recognized exceptions apply and USW must supply the requested information. AT&T also argues that consideration of facts related to the above-referenced rules pertaining work product and non-testifying experts demonstrate that the information in issue has not been generated by USW in a legal-advice, litigation-specific context, but merely in a regulatory duties and normal course of business context, where the rules do not apply.

Discovery and the Attorney-Client Privilege

17. Primarily as a matter of convenience the following discussion focuses on the law as it applies to the discovery-requested production (i.e., providing copies) of USW's OSS studies and related documents. Of course, more than production of these documents is in issue. Two of the data requests in issue (JI-018 and JI-048) do not request production, but only request general information pertaining to USW's OSS studies and related documents. Additionally, in its pursuit of reconsideration USW requests that the PSC issue an order of protection encompassing more than simply production of documents, also seeking protection from providing general information about the OSS studies and related documents in all pending discovery, future discovery, and at hearing. Discussion of these non-production aspects of the discovery in issue will follow discussion of the production aspect.

18. As another preliminary point, one important aspect of law regarding

proper application of the attorney-client privilege to USW's production of the OSS studies and related documents is that aspect which pertains to communications of persons who are integrally involved in the attorney-client relationship, but who are not the attorney and not the client. Primarily for convenience these other persons will be referred to in this discussion as "agents." This term of choice is merely intended to categorize the persons in a way that generally reflects that what they have done or communicated in regard to the attorney-client relationship is at the direction of or on behalf of the client or the attorney. The term is not intended to convey any other legal connotation (e.g., the laws of agency or principal and agent).

19. In contested case proceedings, which the above-entitled PSC matter is, Montana administrative agencies, including the PSC, must follow the common law and statutory provisions of evidence. § 2-4-612, MCA. PSC procedural rules acknowledge this. ARM 38.2.4201. Regarding discovery in PSC contested case proceedings the PSC has adopted Montana Rules of Civil Procedure pertaining to discovery. ARM 38.2.3301. Rule 26, M.R.Civ.P., one of the rules so adopted by the PSC, precludes discovery on privileged information, which includes information that is attorney-client privileged. Therefore, whether at the hearing stage or the discovery stage of PSC contested case proceedings, the law of attorney-client privilege applies.

20. Privileges, including the attorney-client privilege, may impede fact finding and access to the truth. The law recognizes this. *See generally* State ex rel., United States Fidelity and Guaranty Co. v. District Court, 240 Mont. 5, 12, 783 P.2d 911, 915 (1990). Nevertheless, the law recognizes a greater benefit in maintaining such privileges, including the attorney-client privilege. Support for this includes § 26-1-803, MCA (i.e., the privilege exists by statute). The attorney-client privilege enables an attorney to provide the best possible legal advice and encourage clients to act within the law. Palmer v. Farmers Insurance Exchange, 261 Mont. 91, 106, 861 P.2d 895, 904 (1993). With the privilege clients are free from consequences and apprehension in disclosing confidential information, encouraging them to be open and forthright with the

attorney. *Id.* The privilege fosters the attorney-client relationship by ensuring that attorneys are free to give accurate and candid advice without fear that the advice will later be used against the client. *Id.*, 261 Mont. at 107, 861 P.2d at 905.

21. Section 26-1-803, MCA, is Montana's statutory provision of evidence pertaining to the attorney-client privilege. It has two related parts, each having several elements. One part relates to examination of the attorney -- unless the client in the attorney-client relationship consents, examination of the attorney regarding communications made by the client to the attorney and advice made by the attorney to the client in the course of professional employment is prohibited. § 26-1-803(1), MCA. The other part relates to examination of the client – except when voluntary on part of the client, examination of the client regarding such communications and advice (i.e., communications made by the client to the attorney and advice made by the attorney to the client in the course of professional employment) is also prohibited. § 26-1-803(2), MCA.

22. As the facts in the present case demonstrate, more persons than simply the attorney and the client can be integrally involved in the attorney-client relationship. Clients, attorneys, or both might retain agents (e.g., investigators, experts, consultants) to assist in analyzing a matter. USW's attorneys, on behalf of USW, have done so in the present case. Clients, particularly clients that are entities (e.g., corporations), might engage agents (e.g., employees, contractors) to assist the corporate attorney or other employees or contractors engaged by that attorney. To some extent USW's employees have been involved with development of the information at issue in the present case. Section 26-1-803, MCA, does not expressly address communications of agents involved in the attorney-client relationship. It speaks only in terms of "communications made by the client" and "advice given to the client [by the attorney]." However, the common law (i.e., case law, primarily from other jurisdictions, as there appears to be no Montana case law in which direct discussion of the point has been necessary) extends the attorney-client privilege to communications involving agents in some instances, but

not in others. *See* discussion *infra* paras. 35-36.

23. In Order No. 5982e (order granting AT&T's motion to compel) the PSC determined that the attorney-client privilege has limited scope and provides only a qualified immunity. *Id.*, paras. 9 and 10. In regard to this the PSC made several determinations, including: the product of a consulting expert is not privileged merely because an attorney has retained the consulting expert or supervised the consulting expert in preparation of the product; the limited scope of the privilege prevents a party from asserting it for improper reasons merely because the attorney hired or supervised the expert; the privilege cannot be created merely by transmitting information to an attorney; and information that cannot be accurately described as legal advice is not protected by the privilege. *Id.*

24. The PSC's determination relating to the product of a consulting expert not being privileged merely because an attorney has retained the consulting expert or supervised the consulting expert in preparation of the product, if intended by the PSC to mean that there must be more involved than the attorney's mere hiring or supervising of a consultant, could be correct. However, the facts regarding the USW attorneys' relationships with the consulting experts in the present matter demonstrate that USW's attorneys did more than merely hire or supervise the consultants. The USW attorneys not only engaged the consultants or directed USW's engagement of the consultants and supervised the consultants, but also monitored progress or the product, contributed to the product, and relied on the subject matter expertise of the consultants in development of legal advice, all in a context designated and maintained as confidential and with the stated expectation that the efforts and the products were to be attorney work product and attorney-client privileged.

25. In support for its determination that the privilege cannot be created merely by transmitting information to the attorney the PSC cited to Clark v. Norris, 226 Mont. 43, 734 P.2d. 182 (1987). Clark, a medical malpractice case, pertains in part to an overruled evidentiary objection based on the attorney-client privilege. The objection

had sought protection of a client-prepared incident report. On appeal it was determined that the purpose of the report was not clear and the confidentiality of the report was not demonstrated and "the attorney-client relationship does not automatically give rise to immunization of every piece of paper a [client] files with its attorney" and "[the] privilege cannot be created in a subject matter merely by transmitting it to an attorney." *Id.*, 226 Mont. at 50-51, 734 P.2d at 187. However, it was further expressed that the existence of the privilege as it might relate to information transmitted to an attorney (e.g., the "piece of paper" or the "subject matter" referenced above) is to be determined by the purpose underlying transmittal of the information and, if the purpose is for confidential transmittal to the attorney, it may be privileged. *Id.*

26. In Clark the client in the attorney-client relationship is a hospital. Hospitals are entities (e.g., corporations), not individuals. Actions of entities, in most cases, can be accomplished only through agents. In Clark the client, through its agents (i.e., employees), made the communication in issue (i.e., the incident report). In the matter now before the PSC the client, through its agents (i.e., contractors), is also making the communication in issue (i.e., the OSS studies). The fact that USW's law department engaged or directed the engagement of the consultants does not, in any legal sense, make the consultants something other than contractors of USW. Unlike in Clark, the present record is clear that the OSS studies and related documents were for confidential transmittal to the attorney (the fact that one of the two copies of the second OSS report referenced in Fitzsimons' affidavit was delivered to USW staff working on the project, does not diminish the confidentiality of the report, all other factors considered). There is no reason to distinguish between client communications through employee agents and client communications through contractor agents. The Clark holding that information confidentially transmitted to the attorney may be privileged applies and the communications in issue are privileged, at least insofar as the Clark case is concerned.

27. In support for its determination that the information in issue must be legal

advice for the privilege to apply the PSC cited to Kuiper v. District Court, 193 Mont. 452, 632 P.2d 694 (1981). Kuiper, a civil action relating to design of a tire rim that exploded and caused injury, involves review of a trial court's grant of a motion to compel responses to requests for admission of the genuineness of documents, over objections in part based on the attorney-client privilege. What can be extracted from the opinion as the law of attorney-client privilege, and what Kuiper applies in an exhibit-by-exhibit analyses of the documents there in issue, is that "[the] privilege only applies statutorily in Montana to communications made by a client to his attorney and legal advice given in response thereto, during the course of professional employment. Section 26-1-803, MCA." Kuiper, 193 Mont. at 461, 632 P.2d at 699. The statute's "advice" is referred to by the court as "legal advice," the adjective probably implied by context, but a helpful clarification in any event. However, Kuiper does not define "legal advice" and Kuiper's exhibit-by-exhibit analysis of documents there in issue sheds no dispositive light on the legal advice aspects of the information in issue before the PSC.

28. The Kuiper holding regarding the privilege only protecting advice that is legal advice needs to be considered only if USW's OSS studies and related documents are not properly client communications (see discussion of Clark, *supra*, paras. 25-26), which obviously need not be legal advice. However, if it were the case that the consultants' communications (i.e., the OSS studies) to USW's attorneys are not privileged client communications, the facts demonstrate that they are legal advice, at least a combination of: (a) legal advice, because USW's attorneys were integrally involved in the development of them; and (b) relevant nonlegal considerations (i.e., subject matter expertise) contributing to the development of legal advice. In Palmer, *supra*, 261 Mont. at 109, 861 P.2d at 906, the court maintained that the attorney-client privilege is not lost merely because the attorney communication contains relevant nonlegal considerations. As far as the Kuiper opinion is concerned, USW's OSS studies and related documents legitimately fall within the category of advice that is legal advice.

29. USW argues that the attorney-client privilege extends absolute immunity (i.e., USW contests the PSC's determination that the privilege is a qualified immunity). USW's assessment is correct, if USW means when the privilege applies, the privilege extends absolute immunity (i.e., when it applies, it is not of limited scope or qualified immunity). In support of its argument USW cites to several cases, including Palmer, *supra*, 261 Mont. 91, 861 P.2d 895, and United States v. Rowe, 96 F.3d 1294 (9th Cir. 1996).

30. In Palmer, a case involving insurance bad faith, the trial court had compelled an insurer to produce information claimed to be attorney-client privileged, basing its action on a showing of need by the insured. Appeal resulted in a reversal. A showing of need may overcome an immunity from discovery given to an attorney's work product, but it does not overcome immunity based on the attorney-client privilege. *Id.*, 261 Mont. at 112, 861 P.2d at 908. Palmer applied the policies underlying the privilege (*see* discussion *supra*, para. 20) to the issues presented there, most discussion of which (e.g., first-party versus third-party bad faith cases, waiver, timing of objections) is not pertinent to the issues presently before the PSC. In relevant part, Palmer does reiterate the Kuiper holding that, absent a voluntary waiver or an exception, the privilege applies to all communications from the client to the attorney and to all advice given to the client by the attorney in the course of the professional relationship. Palmer, 261 Mont. at 108-109, 861 P.2d at 906.

31. Rowe, is a case involving the handling of client funds by an attorney in a law firm and the attorney-client privilege as it might extend to the law firm's investigation of that attorney. An aspect of the Rowe decision that is arguably relevant to the issue now before the PSC is the court's determination that fact-finding which pertains to legal advice is "professional legal services" (referring to an earlier determination in Rowe that the attorney-client privilege can exist only after a client consults an attorney for the purpose of facilitating the rendition of "professional legal services"), not ordinary business purposes. Rowe, 96 F.3d at 1297. Rowe (citing to other cases) indicates

UpJohn, *infra*, has been interpreted as precluding any finding that fact gathering by attorneys on behalf of a corporate client can be for business, not legal, purposes. *Id.* Regarding the issues now before the PSC USW's engagement of the consultants is for the purpose of fact finding and the context pertains to legal advice.

32. In response, AT&T argues that the attorney-client privilege is subject to carefully crafted limitations, one being that § 26-1-803(1), MCA, protects communications only, not underlying facts. Although "carefully crafted limitations" is a debatable description, AT&T is correct in concept – not everything done by clients, attorneys, or agents in the attorney-client relationship is privileged. In support of its arguments AT&T cites to UpJohn v. United States, 449 U.S. 383 (1981).

33. UpJohn is an opinion of the United States Supreme Court, cited in several of the cases referenced above. UpJohn discusses the attorney-client privilege, particularly as that privilege relates to corporate clients and attorneys. Much of what UpJohn discusses regarding the corporate setting is not related to matters in issue before the PSC. At one point UpJohn does discuss corporate employees and the attorney-client relationship, essentially holding that a common legal theory up to that point, confining application of the privilege to communications of the corporate control group (i.e., management), is contrary to the purpose of the privilege and the privilege should extend to all corporate employees. *Id.*, 449 U.S. at 396-397. At another point where UpJohn is arguably relevant, AT&T argues that UpJohn articulates the identical view on the scope of the privilege as does Montana's statute – the privilege protects the communications not the underlying facts disclosed by others to the attorney. AT&T's assessment is accurate, as UpJohn does state the privilege protects communications (449 U.S. at 395) and § 26-1-803, MCA (attorney-client privilege), does state the privilege protects communications.

34. AT&T's referenced "communications not the underlying facts" concept naturally extends to communications of agents involved in the attorney-client relationship, including agents who are expert consultants retained by the attorney or the

client to assist in rendering legal advice. However, the point of the "communications not the underlying facts" concept is not that communications must be disclosed if they contain facts, it is that facts cannot be concealed merely because they are included in a communication qualifying as privileged. *See generally*, Upjohn, 449 U.S. at 395-396. The communication itself, if privileged, remains privileged, the underlying facts do not. The correct avenue towards discovery, if not barred by other rules, is to direct discovery at the facts, not the communications. Two of the joint intervenor data requests now in issue (JI-018 and JI-048) are properly directed at the facts.

35. USW argues that the privilege extends to reports provided to attorneys by others, citing to several cases, including United States v. Kovel, 296 F.2d 918 (1961). In Kovel an accountant employed by a law firm to assist in tax cases refused to testify before a grand jury, asserting attorney-client privilege. The accountant was jailed for contempt. On appeal the court discussed the application of the privilege to those who are not attorneys, but who are engaged by attorneys to assist in matters. The court discussed the positions of several legal commentators on the subject and, in part arguably relevant to the issue now before the PSC, concluded that the privilege applies to communications made in confidence to those who are not attorneys, but are engaged by attorneys to assist, if done for the purpose of obtaining legal advice from an attorney. Kovel, 296 F.2d at 922. It is unclear whether AT&T disputes what Kovel holds regarding communications, but AT&T argues that Kovel is inapplicable, as neither Kovel nor any other case cited by USW on the particular point extends the privilege beyond the communications to encompass underlying facts, data, and analysis contained in the reports of those assisting the attorneys. USW replies that a consultant's report to an attorney is a communication.

36. AT&T acknowledges that the privilege can so extend, but only under limited circumstances (e.g., agent retained by the attorney, resulting report integral to legal advice, not in the ordinary course of business), which AT&T argues are circumstances not existing in the present matter before the PSC. AT&T argues that the

privilege does not extend to certain reports provided to attorneys by others, citing to Southern Bell Telephone and Telegraph Company v. Deason, 632 So.2d 1377 (1994). In Southern Bell the court was reviewing Florida PSC action (in four investigative proceedings consolidated with a rate case) directing telephone companies to disclose certain documents claimed to be privileged. At issue (in one of the investigative proceedings) were telephone company audit department investigative audits, requested from company staff by company legal counsel. The court simply concluded, without discussion, that such audits, which were systematic analyses of data, cannot be considered the type of statement traditionally classified as a communication for the purposes of the attorney-client privilege. *Id.*, 632 So.2d at 1384. USW argues Southern Bell does not apply to the issue now before the PSC because, rather than involving mere systematic analyses of data by employees, the information in issue before the PSC involves opinions and analyses of outside experts and the mental impressions and legal theories of attorneys. USW is correct. The circumstances underlying the issues now before the PSC are distinct from those in Southern Bell.

37. From all arguments presented and the discussion above, the proper legal conclusion is that USW's OSS studies and related documents are attorney-client privileged. The OSS studies were developed to assist in rendering legal advice, the studies have been maintained as confidential for that purpose, and the studies were confidentially transmitted to the attorneys. To the extent the studies are not communications, they are legal advice as they include legal advice and are otherwise comprised of relevant nonlegal considerations contributing to the development of legal advice. The studies have been developed in the context and course of professional employment of legal counsel and whether properly deemed client communications, attorney legal advice, or both in that context, they can be nothing else. The studies are therefore privileged under § 26-1-803, MCA, and case law interpreting that statute. The purpose of the privilege is upheld by so concluding. USW need not produce the OSS studies or documents related to those studies. The proper legal conclusion also

includes that the privilege extends only to the actual OSS studies and the documents related to those studies, not the facts underlying them. The attorney-client privilege protects communications, not the facts underlying the communications.

38. As previously indicated, the above discussion focuses on the law as it applies to USW's production of the OSS studies and related documents, but more information is involved. Data request JI-018 requests the dates of USW OSS interface testing, the objectives of the tests, the methodologies used in the tests, and the results of the tests. These requests primarily pertain to facts underlying the studies. Data request JI-048 requests the identification of consultants retained for the studies, inquires about dates, and requests an identification of what the studies discovered (i.e., the results, concerns, problems, and deficiencies identified in the studies). These requests also primarily pertain to facts underlying the studies. Such facts are not privileged. The attorney-client privilege protects communications, not the underlying facts. Unless protected from disclosure by other applicable rules (*see* discussion of work product and non-testifying witnesses *infra*, paras. 39-48), USW must respond to data requests JI-018 and JI-048 (i.e., the non-production data requests).

Discovery, Work Product, and Non-Testifying Experts

General

39. As determined above, the joint intervenors are not entitled to USW's OSS studies or the documents related to those studies. The studies and related documents are attorney-client privileged. However, unless protected from disclosure by other provisions of law, USW must respond to all parts of JI-018 and JI-048 (i.e., the non-production data requests). USW's responses, if required, would undoubtedly be based on the studies, but as underlying facts rather than communications. There are other provisions of law arguably applicable to the underlying facts. These provisions are in Rule 26, M.R.Civ.P., and are categorized as rules pertaining to "trial preparation" (i.e., information developed or obtained in anticipation of litigation).

40. AT&T argues that USW has not demonstrated that the data requests in issue pertain to materials prepared or witnesses engaged in anticipation of litigation. If such were the case the prohibition against discovery on work product and non-testifying experts would not apply and the circumstances allowing exceptions to that general prohibition would not need to be considered. The facts do not support AT&T's position. USW's OSS studies and the documents related to those studies were prepared in anticipation of litigation (see discussion *supra*, para. 14).

41. Rule 26 has been adopted by the PSC for discovery purposes. ARM 38.2.3301. Rule 26, implying that information developed or obtained in anticipation of litigation is generally not discoverable, provides for special circumstances under which it is. So long as certain conditions exist, Rule 26(b)(3) permits discovery of material prepared in anticipation of litigation by a party, including that prepared by or for the party's attorney. The information at which the rule is directed is commonly referred to as work product. So long as certain requirements are met, a second rule, Rule 26(b)(4)(B), allows discovery of facts known and opinions held by experts retained in anticipation of litigation or preparation for trial, but not expected to be called as witnesses. Discovery under these rules does not override any privilege. Both provisions require that the material sought be otherwise discoverable under Rule 26(b)(1). Rule 26(b)(1) expressly precludes discovery of privileged material. Because USW's OSS studies and documents related to those studies are privileged, they remain undiscoverable.

Work Product

42. In order to obtain discovery of work product that is otherwise discoverable, Rule 26(b)(3) requires a showing that the party seeking discovery has a substantial need of the materials in the preparation of its case and is unable without undue hardship to obtain the substantial equivalent of the materials by other means. If the showing is made, the rule requires that the court (i.e., the PSC in the present instance)

shall protect against disclosure of the mental impressions, conclusions, or legal theories of an attorney or other representative of a party concerning the litigation. Because of this required protection, there are essentially two types of work product, ordinary work product (i.e., that which is not mental impressions and so forth) and opinion work product (i.e., that which is mental impressions and so forth). As is the case with the attorney-client privilege, work product protection does not extend to facts. By its own terms the work product rule applies to documents and tangible things, not facts concerning creation of the work product or facts within the work product. 6 James Wm. Moore et al., Moore's Federal Practice para. 26.70(2)(b) (3d ed., 1997).

Ordinary Work Product

43. The present discussion on the issues before the PSC has already reached the point, through application of the attorney-client privilege, where the tangible things and documents in issue (i.e., the communications) are not discoverable and the facts underlying the tangible things and documents are discoverable. Therefore, ordinary work product need not be discussed (see discussion *supra*, para. 42, i.e., work product only protects materials, not facts). Under the circumstances surrounding the issues now before the PSC, nothing about ordinary work product would either add to or subtract from the effect of the previous discussion on attorney-client privilege.

Opinion Work Product

44. The discussions of work product and ordinary work product apply to opinion work product as well, except there are two reasons justifying at least some further discussion. One is that the material protected by the attorney-client privilege is also protected as opinion work product. The other is that some of the information (i.e., facts underlying the communications) not protected by the attorney-client privilege may be protected as opinion work product. The standard for obtaining opinion work product is not the rule-referenced "substantial need" and "undue hardship" applicable to

ordinary work product. The rule itself, Rule 26(b)(3), can easily be interpreted as an absolute bar to obtaining opinion work product (i.e., "the court shall protect against disclosure of the mental impressions, conclusions, or legal theories of an attorney or other representative of a party concerning the litigation"). The Montana Supreme Court has not held that the provision is an absolute bar, but it has endorsed the statement "opinion work product enjoys nearly absolute immunity and can be discovered only in very rare and extraordinary circumstances" (citations omitted). Palmer, *supra*, 261 Mont. 91, 116-117, 861 P.2d 895, 911 (1993). "Rare and extraordinary circumstanoes" means that the mental impressions actually are the issue in the case. *Id.* Mental impressions are not the issue in the present case before the PSC and the required rare and extraordinary circumstances therefore do not exist. Given this, if it were the case that USW's studies and related documents are not attorney-client privileged (which they are) they would be protected as opinion work product because the studies and related documents are mental impressions, conclusions, opinions, or legal theories of USW's attorneys or other representatives. Additionally, because the requisite showing for access to the information has not been made, to the extent that the remaining information in issue (i.e., information requested by the non-production data requests) not protected by the attorney-client privilege amounts to opinion work product (i.e., a mental impression, conclusion, opinion, or legal theory of USW's attorneys or other representatives) it is protected as opinion work product and is not discoverable.

Non-Testifying Experts

45. The final "trial preparation" rule arguably applicable is Rule 26(b)(4)(B). It pertains to discovery of facts known and opinions held by experts retained in anticipation of litigation or preparation for trial, but not expected to be called as witnesses. As indicated above, the rule does not override the attorney-client privilege. In order to obtain discovery of the facts known and opinions held by non-testifying experts there must be exceptional circumstances under which it is impractical for the

party seeking discovery to obtain facts and opinions on the same subject by other means. The rule extends to the identity of the witness as well as the facts known and opinions held by the expert. Burlington Northern v. District Court, 239 Mont. 207, 215, 779 P.2d 885, 890 (1989). The meaning of the rule-referenced "exceptional circumstances" and "impractical to obtain" has not been judicially determined in Montana. However, the rule is identical to the federal rule on the same subject.

46. AT&T argues that the protection provided by Rule 26(b)(3) is subject to Rule 26(b)(4)(B). If AT&T's argument is intended to mean that discovery under Rule 26(b)(4)(B) is not affected by the provision in Rule 26(b)(3) regarding protection of mental impressions, conclusions, opinions, or legal theories, it is correct only in regard to the experts. The introductory provision of Rule 26(b)(3) (i.e., "[s]ubject to the provisions of subdivision (b)(4) of this rule") does not limit the second sentence in Rule 26(b)(3), regarding mental impressions, conclusions, opinions, or legal theories of attorneys. Bogosian v. Gulf Oil Corp., 738 F.2d 587, 594 (3rd Cir., 1984).

47. AT&T argues that relevant federal decisions have established at least two situations satisfying the exceptional circumstances standard: where the object or condition is no longer observable by an expert of the party seeking discovery; and where it may be possible to replicate discovery but the costs would be judicially prohibitive. Bank Brussells Lambert v. Chase Manhattan Bank, 175 F.R.D. 34, 44 (S.D.N.Y., 1997). AT&T argues that the first instance exists where access is refused to the location necessary to replicate the efforts of the non-testifying expert. *Id.* AT&T argues that the situation in the present case before the PSC makes these conditions applicable. AT&T argues that it has had no opportunity to observe and test USW's OSS functions, that it has neither been granted access to the functions nor offered the same level of cooperation from USW employees as USW consultants have obtained, and it does not have the intimate knowledge necessary to conduct the tests. There is also the question of whether the costs for one or more of the intervenors would be judicially prohibitive. The facts do not show that USW has denied AT&T access. The

facts do not show that the costs of replicating discovery would be judicially prohibitive.

48. Regarding non-testifying experts, AT&T also argues that to the extent USW's testifying experts have relied on, seen, or used the opinions or conclusions of USW's non-testifying experts USW has opened the door to discovery. AT&T is correct in concept. Documents obtained from a retained non-testifying expert and provided to an expert designated as a testifying witness become discoverable. 6 James Wm. Moore et al., Moore's Federal Practice para. 26.80(2) (3d ed., 1997). However, the facts indicate that the documents have remained confidential. There is no indication that the documents have been provided to any testifying witness. Furthermore, absent circumstances amounting to a waiver, if the documents were so provided the attorney-client privilege may remain applicable, if the testifying witnesses, like the non-testifying witnesses in this matter before the PSC, are in a privileged attorney-client relationship.

III. DECISION

49. USW's OSS studies and documents related to those studies are communications between attorney and client, transmitted in the context of a professional relationship, and are protected by the attorney-client privilege. USW need not produce copies of the OSS studies or the documents related to those studies. However, the attorney-client privilege protects the actual communications, not the facts underlying those communications. Therefore, unless the facts underlying the communications are protected through other means, USW could be required to respond to all joint intervenor data requests directed at the facts underlying the OSS studies and the documents related to those studies. Other means of protection applicable to the facts underlying the communications have been considered. Ordinary work product is one of them. However, in effect similar to the attorney-client privilege, it protects only documents and tangible things, not the underlying facts. So, nothing would be gained by discussing it. Opinion work product is another. It is applicable and, in regard to the facts underlying the communications, it extends protection to any mental impressions,

conclusions, opinions, and legal theories of USW's attorneys or other representatives. In providing facts underlying USW's OSS studies and related documents, USW need not provide mental impressions, conclusions, opinions, or legal theories of its attorneys or other representatives. Non-testifying experts is another means of protection of facts underlying communications. The standards which allow an exception to the general prohibition on discovery of trial preparation, non-testifying experts, has not been met. Therefore, what is not discoverable in this case includes USW's OSS studies and related documents and any facts underlying the studies or related documents which qualify as mental impressions, conclusions, opinions, or legal theories of USW's attorneys or other representatives, or which qualify as facts known or opinions held by the non-testifying experts, and the identity of the non-testifying experts. What is discoverable is all other facts underlying the communications. For each intervenor data request in issue, item-by-item, proper application of this decision is as follows.

a. Data request JI-018(a) inquires as to the dates of USW OSS interface testing. Data request JI-048(b) and (c) inquire as to the dates of USW agreements with the consultants performing the studies and the dates of the resulting studies. The dates are facts underlying privileged communications and ordinary work product. As such they are not protected under the attorney-client privileged or as ordinary work product. The dates do not qualify as opinion work product or trial preparation facts exclusively known to non-testifying experts. USW must supply the requested dates.

b. Data request JI-018(b) inquires as to the objectives of the USW OSS interface tests. Data request JI-018(c) inquires as to the methodologies used in the tests. It appears that USW has attempted to respond to these inquiries. To the extent USW has not fully or clearly responded, these inquiries also pertain to facts underlying privileged communications and ordinary work product, and are therefore not protected under the attorney-client privileged or as ordinary work product. It is doubtful, but nevertheless possible, that the requested objectives and methodologies could include opinion work product and might be exclusively known to non-testifying experts. USW

must supply the requested information, but in a format that does not include the mental impressions, conclusions, opinions, or legal theories of its attorneys or other representatives, or facts exclusively known or opinions held by non-testifying experts.

c. Data request JI-018(d) inquires as to the results of the tests. Data request JI-048(d) requests identification of what the studies discovered. These requests also pertain to facts underlying privileged communications. Such facts are not privileged. However, it is more than probable that the requested results and identification of what the studies discovered will include opinion work product and facts known and opinions held by non-testifying experts. USW must supply the requested information, but in a format that does not include the mental impressions, conclusions, opinions, or legal theories of its attorneys or other representatives.

d. JI-048(a) requests identification of the consultants. The names of the consultants are not discoverable and USW need not provide them.

e. JI-049 requests production of documents related to USW's OSS studies. The documents are attorney-client privileged and USW need not produce them.

Dated this 4th day of September, 1998.

Martin Jacobson
PSC-Appointed Special Master

Service Date: September 11, 1998

DEPARTMENT OF PUBLIC SERVICE REGULATION
BEFORE THE PUBLIC SERVICE COMMISSION
OF THE STATE OF MONTANA

* * * * *

IN THE MATTER of the Investigation into U S WEST Communications, Inc.'s, Compliance with Section 271(c) of the Telecommunications Act of 1996.	))))	UTILITY DIVISION DOCKET NO. D97.5.87 ORDER NO. 5982h

ORDER ON RECONSIDERATION
OF ORDER COMPELLING DISCOVERY

U S West Communications, Inc. (USW), has filed a motion for reconsideration of the Public Service Commission's (PSC) June 29, 1998, Order No. 5982e. That order required USW to respond to certain joint intervenor data requests (i.e., discovery) in the above-entitled matter. USW's motion for reconsideration was briefed and argued orally before the PSC.

For reasons related to the nature of the discovery-requested information in issue, on August 6, 1998, the PSC appointed a special master to review the facts and arguments involved. On September 4, 1998, the appointed special master issued a report, in the form of a decision, to the PSC. The PSC has reviewed and considered the special master's decision and determines that it should be adopted as the PSC's order on USW's motion for reconsideration.

IT IS HEREBY ORDERED that the PSC adopts the September 4, 1998, Decision of Special Master on Discovery Issue (a copy of which is attached) as the PSC's Order on Reconsideration.

Done and dated this 9th day of September, 1998, by a vote of 5-0.

BY ORDER OF THE MONTANA PUBLIC SERVICE COMMISSION

DAVE FISHER, Chair

NANCY MCCAFFREE, Vice Chair

BOB ANDERSON, Commissioner

BOB ROWE, Commissioner

DANNY OBERG, Commissioner

ATTEST:
Kathlene M. Anderson
Commission Secretary

(SEAL)

MONTANA PUBLIC SERVICE COMMISSION

CERTIFICATE OF SERVICE

* * * * * *

I hereby certify that a copy of an ORDER ON RECONSIDERATION OF ORDER COMPELLING DISCOVERY, in Docket No. D97.5.87, ORDER NO. 5982h, in the matter of PSC INVESTIGATION INTO USWC'S COMPLIANCE WITH SECTION 271 (c) OF THE TELECOMMUNICATION ACT OF 1996, dated September 11, 1998, has today been served on all parties listed on the Commission's most recent service list, updated 8/27/98, by mailing a copy thereof to each party by first class mail, postage prepaid.

Date: September 11, 1998

Rachel Thompson
For The Commission

Intervenors

Montana Consumer Counsel
Montana Department of Administration, Information Services Bureau
Eclipse Communications Corp.
AT&T Communications of the Mountain States, Inc.
ICG Telecom Group, Inc.
MCI Telecommunications Corporation
McLeod, USA, Inc.
Montana Independent Telecommunications Systems
Montana TEL-NET
Northwest Payphone Association
Skyland Technologies, Inc.
Sprint Communications Company L.P.
Telecommunications Resellers Association
Touch America
Ronan Telephone Company
Hot Springs Telephone Company
Montana Telephone Association (withdrew)
Teleport Communications Group, Inc.

Exhibit D

August 14, 1998 Decision of Nebraska Special Master

BEFORE THE NEBRASKA PUBLIC SERVICE COMMISSION

In the Matter of US West Communications, Inc., filing of its notice of intention to file Section 271(c) application with the FCC and request for Commission to verify US West compliance with Section 271(c).	Application C-1830 PROCEDURES PROGRESSION ORDER #5 Entered: August 14, 1998

On July 21, 1998, the Nebraska Public Service Commission (the "Commission") entered Procedure Progression Order #2 appointing the undersigned as a Special Master to hear and rule upon discovery and other related issues. On July 21, July 27, July 29, and July 30, 1998, the Special Master held hearings after due notice with all of the interested parties present, some by telephone conference call. At such hearings, objections to various requests for admission and motions to compel answers were discussed and argued by the parties. On July 31, 1998, Procedure Progression Order #3 was entered by the Special Master ordering an in camera review of certain material in the possession of US West, respecting which it claimed the attorney-client, work product, and self-evaluation privileges. That material has been submitted to the Special Master, and an in camera review has been conducted. Other pending objections to the responsiveness of certain requests, previously taken under submission, have been considered. Accordingly, the Special Master makes the following findings and rulings respecting all discovery issues which are pending as of this date:

1. Respecting Aliant Midwest and McLeod USA, all objections have been agreed upon between the parties with the exception of US West's objection to the relevance of its withdrawal of the Centrex system. The Special Master previously advised the parties that since the circumstances of such withdrawal were relevant under the public interest requirement of Section 271, this objection was overruled, and US West ordered to respond accordingly.

2. Joint intervenors submitted 158 requests for information, to most of which US West objected, and the intervenors moved to compel. At various prior hearings, the Special Master gave his rulings on the record respecting objections to many of those requests. A general relevance objection to Section 272 issues was overruled, to allow this Commission to make a proper record for the FCC to determine whether Section 272 has been satisfied. Others were agreed upon and resolved between the parties. A few were taken under submission by the Special Master subject to further review and the in camera inspection. For clarification, the status of compliance, objections and rulings by the Special Master will be set forth respecting each request as follows:

Request 1. On July 29, the intervenors stated the response was satisfactory.

Request 2. On July 30, the intervenors stated the response was satisfactory.

Request 3. On July 29, the intervenors stated the response was satisfactory.

Request 4. On July 29, the intervenors stated the response was satisfactory.

Request 5. On July 30, the intervenors stated the response was satisfactory.

Request 6. The intervenors stated the answer was not responsive, and a ruling was requested on July 30. The Special Master finds that the first question could have been answered "yes" or "no" and, therefore, was not responsive. The first two sentences of the second question are sufficiently compound to prevent US West from making a response.

Request 7. US West had not responded on July 29 other than referring to Montana material. On July 30, intervenors stated they would see if the four boxes of recently received material satisfied the request.

Request 8. On July 29, US West had not complied. On July 30, it advised that a further response was being furnished.

Request 9. On July 29, US West had not complied other than to refer to Montana material. On July 30, the intervenors stated they would see if the four boxes of material satisfied the request.

Request 10. On July 30, a satisfactory response was given.

Request 11. As of July 27, US West had not complied other than to refer to Montana material. On July 30, intervenors stated that they would see if the four boxes of material satisfied the request.

Request 12. On July 29, intervenors stated the response was satisfactory.

Request 13. On July 29, US West had not responded other than referring to Montana material. On July 30, intervenors stated they would see if the four boxes of material satisfied the request.

Request 14. On July 29, US West had not responded other than referring to Montana material. On July 30,

intervenors stated they would see if the four boxes of material satisfied the request.

Request 15. On July 29, US West had not responded other than referring to Montana material. On July 30, intervenors stated they would see if the four boxes of material satisfied the request.

Request 16. On July 29, US West had not responded other than referring to Montana and Wyoming material. On July 30, intervenors stated they would see if the four boxes of material satisfied the request.

Request 17. On July 29, US West had not responded other than referring to Montana material. On July 30, intervenors stated they would see if the four boxes of material satisfied the request.

Request 18. On July 29, US West had not responded other than referring to Montana material. On July 30, intervenors stated they would see if the four boxes of material satisfied the request.

Request 19. On July 29, intervenors stated the response was satisfactory.

Request 20. On July 29, intervenors stated the response was satisfactory.

Request 21. On July 30, intervenors stated the response was not responsive. The Special Master agrees. If US West cannot state how many CLE design and non-design orders per day can be manually processed at the specified delivery centers, it should so state. Otherwise, it should furnish the specific number.

Request 22. On July 29, intervenors stated the response was satisfactory.

Request 23. On July 29, intervenors stated the response was satisfactory.

Request 24. On July 29, intervenors stated the response was satisfactory.

Request 25. On July 29, intervenors stated the response was satisfactory.

Request 26. On July 29, intervenors stated the response was satisfactory.

Request 27. On July 29, intervenors stated the response was satisfactory.

Request 28. On July 29, intervenors stated the response was satisfactory.

Request 29. On July 29, intervenors stated the response was satisfactory.

Request 30. As of July 29, US West had not responded. On July 30, it stated that it would do so.

Request 31. On July 29, intervenors stated the response was satisfactory.

Request 32. On July 29, intervenors stated the response was satisfactory.

Request 33. On July 29, intervenors stated the response was satisfactory.

Request 34. As of July 29, certain attachments were missing, which were furnished on July 30.

Request 35. On July 29, intervenors stated the response was satisfactory.

Request 36. On July 29, intervenors stated the response was satisfactory.

Request 37. US West did not furnish any information pursuant to this request, but objected based upon the attorney-client, work product, and self-evaluation privilege. It subsequently furnished to the Special Master three reports for an in camera review. The same have been reviewed, and the Special Master finds that material contained therein is subject to the attorney-client and work product privilege, and need not be produced. That is because these reports were made to facilitate the rendition of legal services to US West. The primary motivation for the surveys was to aid in pending and anticipated litigation. The material furnished will be sealed subject to appellate review, as per Greenwalt v. Wal-Mart Stores, 253 Neb. 32, 567 N.W.2d 560 (1997). However, the underlying facts upon which the surveys were based are not privileged, simply because they were incorporated in the reports.

Request 38. US West did not furnish any information pursuant to this request, but objected based upon the attorney-client, work product, and self-evaluation privilege. It subsequently furnished to the Special Master three reports for an in camera review. The same have been reviewed, and the Special Master finds that material contained therein is subject to the attorney-client and work product privilege, and need not be produced. That is because these reports were made to facilitate the rendition of legal services to US West.

The primary motivation for the surveys was to aid in pending and anticipated litigation. The material furnished will be sealed subject to appellate review, as per Greenwalt v. Wal-Mart Stores, 253 Neb. 32, 567 N.W.2d 560 (1997). However, the underlying facts upon which the surveys were based are not privileged, simply because they were incorporated in the reports.

Request 39. On July 30, intervenors stated the response was satisfactory.

Request 40. On July 29, US West had not responded other than referring to Montana material. On July 30, intervenors stated they would see if the four boxes of material satisfied the request.

Request 41. US West did not furnish any information pursuant to this request, but objected based upon the attorney-client, work product, and self-evaluation privilege. It subsequently furnished to the Special Master three reports for an in camera review. The same have been reviewed, and the Special Master finds that material contained therein is subject to the attorney-client and work product privilege, and need not be produced. That is because these reports were made to facilitate the rendition of legal services to US West. The primary motivation for the surveys was to aid in pending and anticipated litigation. The material furnished will be sealed subject to appellate review, as per Greenwalt v. Wal-Mart Stores, 253 Neb. 32, 567 N.W.2d 560 (1997). However, the underlying facts upon which the surveys were based are not privileged, simply because they were incorporated in the reports.

Request 42. US West did not furnish any information pursuant to this request, but objected based upon the attorney-client, work product, and self-evaluation privilege. It subsequently furnished to the Special Master three reports for an in camera review. The same have been reviewed, and the Special Master finds that material contained therein is subject to the attorney-client and work product privilege, and need not be produced. That is because these reports were made to facilitate the rendition of legal services to US West. The primary motivation for the surveys was to aid in pending and anticipated litigation. The material furnished will be sealed subject to appellate review, as per Greenwalt v. Wal-Mart Stores, 253 Neb. 32, 567 N.W.2d 560 (1997). However, the underlying facts upon which the surveys were based are not privileged, simply because they were incorporated in the reports.

Request 43. As of July 29, US West objected to the request as burdensome, and the joint intervenors objected to the response as not being responsive. The objection

that the request is burdensome is overruled. The responses to questions A, B and C are responsive. The answer to question D is not responsive as the question asks for a number, rather than a "yes" or "no" answer. The answer to question E is not responsive as it asks for the production of copies of certain agreements. Such copies should either be produced or, if they do not exist, US West should so state.

Request 44. On July 29, intervenors stated the response was satisfactory.

Request 45. On July 29, US West had not responded other than referring to Montana material. On July 30, intervenors stated they would see if the four boxes of material satisfied the request.

Request 46. On July 29, intervenors stated the response was satisfactory.

Request 47. US West had not responded as of July 29, but objected to the request as burdensome. That objection has been overruled and on July 30, US West stated that it would furnish the requested material.

Request 48. On July 29, intervenors stated the response was satisfactory.

Request 49. US West had not responded by July 29. On July 30, it stated it would furnish a response.

Request 50. On July 29, intervenors stated the response was satisfactory.

Request 51. US West made a partial response by July 29, and on July 30 stated that it would furnish a further response.

Request 52. On July 29, intervenors stated the response was satisfactory.

Request 53. On July 29, intervenors stated the response was satisfactory.

Request 54. On July 29, US West had not responded other than referring to Montana material. On July 30, intervenors stated they would see if the four boxes of material satisfied the request.

Request 55. US West's initial response did not include attachments, which were furnished as of July 30.

Request 56. On July 29, US West had not responded other than referring to Montana material. On July 30,

intervenors stated they would see if the four boxes of material satisfied the request.

Request 57. On July 29, intervenors stated the response was satisfactory.

Request 58. On July 29, intervenors stated the response was satisfactory.

Request 59. On July 29, intervenors stated the response was satisfactory.

Request 60. Prior to July 27, US West objected that the request was burdensome and the material was subject to a protective order in the State of Iowa. The objection is sustained. If the joint intervenors wish this information, they should apply to the State of Iowa for the same.

Request 61. On July 29, intervenors stated the response was satisfactory.

Request 62. On July 29, intervenors stated the response was satisfactory.

Request 63. On July 29, intervenors stated the response was satisfactory.

Request 64. On July 29, intervenors stated the response was satisfactory.

Request 65. On July 29, US West partially had responded, and the joint intervenors objected that the material was not fully responsive. The Special Master concurs. If the requested information is not available, US West should so state and should also advise when the information will be available.

Request 66. On July 29, intervenors stated the response was satisfactory.

Request 67. On July 29, intervenors stated the response was satisfactory.

Request 68. On July 29, US West had not responded. On July 30 it advised that it was furnishing information on that date.

Request 69. On July 29, US West had not responded. On July 30 it advised that it was furnishing information on that date.

Request 70. On July 29, intervenors stated the response was satisfactory.

Request 71. On July 29, intervenors stated the response was satisfactory.

Request 72. On July 29, intervenors stated the response was satisfactory.

Request 73. On July 29, intervenors stated the response was satisfactory.

Request 74. On July 30, intervenors stated the response was satisfactory.

Request 75. On July 29, intervenors stated the response was satisfactory.

Request 76. US West's initial response answered six of fourteen categories. On July 30, US West advised that it would answer the remainder prior to July 31.

Request 77. On July 29, intervenors stated the response was satisfactory.

Request 78. On July 29, US West had not responded other than referring to Montana material. On July 30, intervenors stated they would see if the four boxes of material satisfied the request.

Request 79. On July 29, intervenors stated the response was satisfactory.

Request 80. On July 29, intervenors stated the response was satisfactory.

Request 81. On July 29, intervenors stated the response was satisfactory.

Request 82. On July 29, intervenors stated the response was satisfactory.

Request 83. Prior to July 27, US West objected that the request was burdensome. The joint intervenors stated the response was non-responsive. The burdensome objection is overruled. The Special Master interprets the response as stating that the information is not available.

Request 84. Prior to July 27, US West objected that the request was burdensome, which objection is overruled. The joint intervenors objected that the response was not complete and responsive. The requested surveys, plans and documents should be furnished. If none exist, US West should so state. Reference to and attachment of the responses in Montana and Wyoming are not adequate.

Request 85. On July 29, US West had not responded other than referring to Montana and Wyoming materials. On July 30, intervenors stated they would see if the four boxes of material satisfied the request.

Request 86. On July 29, US West had not responded other than referring to Montana and Wyoming materials. On July 30, intervenors stated they would see if the four boxes of material satisfied the request.

Request 87. On July 29, US West had not responded other than referring to Montana and Wyoming materials. On July 30, intervenors stated they would see if the four boxes of material satisfied the request.

Request 88. On July 29, intervenors stated the response was satisfactory.

Request 89. On July 29, US West had not responded other than referring to Montana material. On July 30, intervenors stated they would see if the four boxes of material satisfied the request.

Request 90. On July 20, US West had not responded other than referring to Montana material. On July 30, intervenors stated they would see if the four boxes of material satisfied the request.

Request 91. On July 29, intervenors stated the response was satisfactory.

Request 92. On July 29, intervenors stated the response was satisfactory.

Request 93. On July 29, intervenors stated the response was satisfactory.

Request 94. On July 29, intervenors stated the response was satisfactory.

Request 95. On July 29, intervenors stated the response was satisfactory.

Request 96. On July 29, intervenors stated the response was satisfactory.

Request 97. On July 29, intervenors stated the response was satisfactory.

Request 98. On July 29, intervenors stated the response was satisfactory.

Request 99. On July 29, intervenors stated the response was satisfactory.

Request 100. On July 29, intervenors stated the response was satisfactory.

Request 101. On July 29, US West had not responded other than referring to Montana material. On July 30, intervenors stated they would see if the four boxes of material satisfied the request.

Request 102. On July 29, US West had not responded other than referring to Montana material. On July 30, intervenors stated they would see if the four boxes of material satisfied the request.

Request 103. On July 29, US West had not responded other than referring to Montana material. On July 30, intervenors stated they would see if the four boxes of material satisfied the request.

Request 104. On July 29, intervenors stated the response was satisfactory.

Request 105. On July 29, intervenors stated the response was satisfactory.

Request 106. On July 29, intervenors stated the response was satisfactory.

Request 107. On July 29, intervenors stated the response was satisfactory.

Request 108. On July 29, intervenors stated the response was satisfactory.

Request 109. Prior to July 27, US West objected to the request as being over-broad and burdensome, which was sustained in part. US West was directed to submit a list. As of July 29, such list had not been furnished, but was furnished as of July 30.

Request 110. On July 29, intervenors stated the response was satisfactory.

Request 111. On July 29, intervenors stated the response was satisfactory.

Request 112. On July 29, intervenors stated the response was satisfactory.

Request 113. US West responded, but did not include an attachment. This was furnished as of July 30.

Request 114. On July 29, US West had not responded other than referring to Montana material. On July 30, intervenors stated they would see if the four boxes of material satisfied the request.

Request 115. On July 29, US West had not responded other than referring to Montana and Wyoming materials. On July 30, intervenors stated they would see if the four boxes of material satisfied the request.

Request 116. On July 29, intervenors stated the response was satisfactory.

Request 117. US West objected to this request as being burdensome, which objection is overruled. The response referred to material furnished in Wyoming, which was objected to by the joint intervenors as being non-responsive. The Special Master agrees that the response is not responsive. Although the word "actions" is vague, the word "meetings" is not. US West should produce any notices, agendas and minutes of such meetings, but need not furnish any other correspondence, memos or documents which may refer to the meetings.

Request 118. On July 29, intervenors stated the response was satisfactory.

Request 119. On July 29, US West had not responded other than referring to Montana and Wyoming materials. On July 30, intervenors stated they would see if the four boxes of material satisfied the request.

Request 120. US West had not fully responded to this request as of July 29, but stated on July 30 that it would do so prior to July 31.

Request 121. On July 29, intervenors stated the response was satisfactory.

Request 122. On July 29, intervenors stated the response was satisfactory.

Request 123. On July 30, US West stated that it will comply on or before July 31.

Request 124. On July 29, US West had not responded other than referring to Wyoming material. On July 30, intervenors stated they would see if the four boxes of material satisfied the request.

Request 125. On July 29, US West had not responded other than referring to Montana material. On July 30, intervenors stated they would see if the four boxes of material satisfied the request.

Request 126. On July 29, intervenors stated the response was satisfactory.

Request 127. On July 29, intervenors stated the response was satisfactory.

Request 128. On July 29, intervenors stated the response was satisfactory.

Request 129. On July 29, US West had not responded other than referring to Wyoming material. On July 30, intervenors stated they would see if the four boxes of material satisfied the request.

Request 130. On July 29, US West had not responded other than referring to Montana material. On July 30, intervenors stated they would see if the four boxes of material satisfied the request.

Request 131. On July 29, US West had not responded other than referring to Wyoming material. On July 30, intervenors stated they would see if the four boxes of material satisfied the request.

Request 132. On July 29, intervenors stated the response was satisfactory.

Request 133. On July 29, intervenors stated the response was satisfactory.

Request 134. On July 29, intervenors stated the response was satisfactory.

Request 135. Attachments A and B of this request were initially missing, but were furnished as of July 30.

Request 136. On July 29, intervenors stated the response was satisfactory.

Request 137. On July 29, intervenors stated the response was satisfactory.

Request 138. On July 30, intervenors stated the response was satisfactory.

Request 139. On July 29, US West had not responded other than referring to Montana material. On July 30, intervenors stated they would see if the four boxes of material satisfied the request.

Request 140. As of July 29, intervenors stated the response was satisfactory.

Request 141. On July 29, US West had not responded other than referring to Montana material. On July 30, intervenors stated they would see if the four boxes of material satisfied the request.

Request 142. As of July 30, intervenors stated the response was satisfactory. US West stated that it would

furnish more information if and when the same became available.

Request 143. On July 30, intervenors stated the response was satisfactory.

Request 144. On July 29, intervenors stated the response was satisfactory.

Request 145. On July 29, intervenors stated the response was satisfactory.

Request 146. On July 29, US West had not responded other than referring to Montana and Wyoming materials. On July 30, intervenors stated they would see if the four boxes of material satisfied the request.

Request 147. On July 29, US West had not responded other than referring to Montana and Wyoming materials. On July 30, intervenors stated they would see if the four boxes of material satisfied the request.

Request 148. As of July 29, intervenors stated the response was satisfactory.

Request 149. US West did not furnish any information pursuant to this request, but objected based upon the attorney-client, work product, and self-evaluation privilege. It subsequently furnished to the Special Master three reports for an in camera review. The same have been reviewed, and the Special Master finds that material contained therein is subject to the attorney-client and work product privilege, and need not be produced. That is because these reports were made to facilitate the rendition of legal services to US West. The primary motivation for the surveys was to aid in pending and anticipated litigation. The material furnished will be sealed subject to appellate review, as per Greenwalt v. Wal-Mart Stores, 253 Neb. 32, 567 N.W.2d 560 (1997). However, the underlying facts upon which the surveys were based are not privileged, simply because they were incorporated in the reports.

Request 150. On July 30, intervenors stated this response was satisfactory.

Request 151. On July 29, intervenors stated this response was satisfactory.

Request 152. On July 29, intervenors stated this response was satisfactory.

Request 153. Joint intervenors withdrew their motion to compel as of July 29, and no further response by US West is required.

Request 154. Joint intervenors withdrew their motion to compel as of July 29, and no further response by US West is required.

Request 155. Joint intervenors withdrew their motion to compel as of July 29, and no further response by US West is required.

Request 156. Joint intervenors withdrew their motion to compel as of July 29, and no further response by US West is required.

Request 157. On July 29, intervenors stated this response is satisfactory.

Request 158. Joint intervenors withdrew their motion to compel as of July 29, and no further response by US West is required.

IT IS SO ORDERED, this 14 day of August, 1998.

Samuel Van Pelt
Special Master

uswest2.svp
082498

ARIZONA REVISED STATUTES

ANNOTATED

1998
Cumulative Pocket Part

For Use In 1998–1999

Replacing 1997 Pocket Part supplementing 1994 main volume

Volume 4A

Title 12
§§12–1101 to 12–End

Including Legislation Enacted In The Second Regular And The Second Through Fifth Special Sessions Of The Forty-Third Legislature (1997–1998)

WEST GROUP

§ 12–2234. Attorney and client

A. In a civil action an attorney shall not, without the consent of his client, be examined as to any communication made by the client to him, or his advice given thereon in the course of professional employment. An attorney's paralegal, assistant, secretary, stenographer or clerk shall not, without the consent of his employer, be examined concerning any fact the knowledge of which was acquired in such capacity.

B. For purposes of subsection A, any communication is privileged between an attorney for a corporation, governmental entity, partnership, business, association or other similar entity or an employer and any employee, agent or member of the entity or employer regarding acts or omissions of or information obtained from the employee, agent or member if the communication is either:

1. For the purpose of providing legal advice to the entity or employer or to the employee, agent or member.

2. For the purpose of obtaining information in order to provide legal advice to the entity or employer or to the employee, agent or member.

C. The privilege defined in this section shall not be construed to allow the employee to be relieved of a duty to disclose the facts solely because they have been communicated to an attorney.

Amended by Laws 1994, Ch. 334, § 1.

Historical and Statutory Notes

The 1994 amendment designated subsec. A, inserted in the second sentence thereof "paralegal, assistant", and added subsecs. B and C.

Forms

See West's Arizona Legal Forms, Civil Procedure.

Law Review and Journal Commentaries

Drawing negative inferences upon a claim of the attorney-client privilege. Deborah Stavile Bartel, 60 Brook.L.Rev. 1355 (1995).

She's gotta have it now: A qualified rape crisis counselor-victim privilege. 17 Cardozo L.Rev. 141 (1995).

Notes of Decisions

1. Construction and application

Attorney-client privilege is in same category as other professional privileges, such as physician-patient, psychologist-patient, clergyman-penitent, and accountant-client privileges. Ulibarri v. Superior Court in and for County of Coconino (App. Div.1 1995) 184 Ariz. 382, 909 P.2d 449, corrected, review granted, review vacated, review denied 186 Ariz. 419, 924 P.2d 109.

§ 12–2235. Doctor and patient

Cross References

Anatomical gifts,
Patient confidentiality, see § 36–845.

Sale or purchase of parts, violation, see § 36–849.

Law Review and Journal Commentaries

She's gotta have it now: A qualified rape crisis counselor-victim privilege. 17 Cardozo L.Rev. 141 (1995).

UNITED STATES of America, Appellee, v. Louis KOVEL, Defendant-Appellant

No. 168, Docket 27207

UNITED STATES COURT OF APPEALS SECOND CIRCUIT

296 F.2d 918; 1961 U.S. App. LEXIS 3045; 62-1 U.S. Tax Cas. (CCH) P9111; 9 A.F.T.R.2d (RIA) 366; 96 A.L.R.2d 116

November 2, 1961, Argued

December 5, 1961, Decided

COUNSEL:
[**1]

Louis Bender, New York City (Louis Bender and Jerome Kamerman), New York City, for appellant.

Gerald Walpin, Asst. U.S. Atty., New York City (Robert M. Morgenthau, U.S. Atty. for Southern Dist. of New York, David Klingsberg, Asst. U.S. Atty., New York City, of counsel), for appellee.

New York County Lawyers' Association, New York City (Boris Kostelanetz, Jules Ritholz and Bud G. Holman, New York City, of counsel), submitted a brief as amicus curiae.

JUDGES:
Before CLARK, HINCKS and FRIENDLY, Circuit Judges.

OPINIONBY:
FRIENDLY

OPINION:

[*919]

This appeal from a sentence for criminal contempt for refusing to answer a question asked in the course of an inquiry by a grand jury raises an important issue as to the application of the attorney-client privilege to a non-lawyer employed by a law firm. Our decision of that issue leaves us with the further problem of what disposition is appropriate on a record which, due to the extreme positions erroneously taken by both parties in the court below, lacks the evidence needed to determine whether or not the privilege existed. We vacate the judgment and remand so that the facts may be developed.

Kovel is a former Internal Revenue agent [**2] having accounting skills. Since 1943 he has been employed by Kamerman & Kamerman, a law firm specializing in tax law. A grand jury in the Southern District of New York was investigating alleged Federal income tax violations by Hopps, a client of the law firm; Kovel was subpoenaed to appear on September 6, 1961, a few days before the date, September 8, when the Government feared the statute of limitations might run. The law firm advised the Assistant United States Attorney that since Kovel was an employee under the direct supervision of the partners, Kovel could not disclose any communications by the client of the result of any work done for the client, unless the latter consented; the Assistant answered that the attorney-client privilege did not apply to one who was not an attorney.

The record reveals nothing as to what occurred on September 6. On September 7, the grand jury appeared before Judge Cashin. The Assistant United States Attorney informed the judge that Kovel had refused to answer 'several questions *** on the grounds of attorney-client privilege'; he proffered 'respectable authority *** that an accountant, even if he is retained or employed by a firm of attorneys, [**3] cannot take the privilege.' The judge answered 'You don't have to give me any authority on that.' A court reporter testified that Kovel, after an initial claim of privilege had admitted receiving a statement of Hopps' assets and liabilities, but that, when asked 'what was the purpose of your receiving that,' had declined to answer on the ground of privilege 'Because the communication was received with a purpose, as stated by the client'; later questions and answers indicated the communication was a letter addressed to [*920] Kovel. After verifying that Kovel was not a lawyer, the judge directed him to answer, saying 'You have no privilege as such.' The reporter then read another question Kovel had refused to answer, 'Did you ever discuss with Mr. Hopps or give Mr. Hopps any information with regard to treatment for capital gains purposes of the Atlantic Beverage Corporation sale by him?' The judge again directed Kovel to answer, reaffirming 'There is no privilege -- you are entitled to no privilege, as I understand the law.' Kovel asked

whether he might say something; the judge instructed him to answer, saying 'I'm not going to listen.' Kovel also declined to tell what Hopps [**4] had said concerning a transaction underlying a bad debt deduction in Hopps' 1954 return, and whether Hopps had told him that a certain transfer of securities 'had no effect whatsoever' and was just a form of accommodation; the judge gave similar directions after the reporter had read each question and refusal to answer. Then the grand jury, the Assistant and Kovel returned to the grand jury room.

Later on September 7, they and Kovel's employer, Jerome Kamerman, now acting as his counsel, appeared again before Judge Cashin. The Assistant told the judge that Kovel had 'refused to answer some of the questions which you had directed him to answer.' A reporter reread so much of the transcript heretofore summarized as contained the first two refusals. The judge offered Kovel another opportunity to answer, reiterating the view, 'There is no privilege to this man at all.' Counsel referred to New York Civil Practice Act, § 353, which we quote in the margin, n1 and sought an adjournment until co-counsel could appear; the judge put the matter over until the next morning.

On the morning of September 8, the same dramatic personae, plus the added counsel, attended in open court. Counsel reiterated [**5] that an employee 'who sits with the client of the law firm *** occupies the same status *** as a clerk or stenographer or any other lawyer * * *'; The judge was equally clear that the privilege was never 'extended beyond the attorney.' In the course of a colloquy the Assistant made it plain that further questions beyond the two immediately at issue might be asked. After the judge had briefly retired, leaving the Assistant and Kovel with the grand jury, proceedings in open court resumed. The reporter recited that in the interval, on reappearing before the grand jury and being asked 'What was the purpose communicated to you by Mr. Hopps for your receiving from him an asset and liability statement of his personal financial situation?', Kovel had declined to answer. On again being directed to do so, Kovel declined 'on the ground that it is a privileged communication.' The court held him in contempt, sentenced him to a year's imprisonment, ordered immediate commitment and denied bail. Later in the day, the grand jury having indicted, Kovel was released until September 12, at which time, without opposition from the Government, I granted bail pending determination of this appeal. [**6]

Here the parties continue to take generally the same positions as below -- Kovel, that his status as an employee of a law firm automatically made all communications to him from clients privileged; the Government, that under no circumstances could there be privilege with respect to communications to an accountant. The New York County Lawyers' Association as amicus curiae has filed a brief generally supporting appellant's position.

I.

Decision under what circumstances, if any, the attorney-client privilege [*921] may include a communication to a nonlawyer by the lawyer's client is the resultant of two conflicting forces. One is the general teaching that 'The investigation of truth and the enforcement of testimonial duty demand the restriction, not the expansion, of these privileges,' 8 Wigmore, Evidence (McNaughton Rev. 1961), § 2192, p. 73. The other is the more particular lesson 'That as, by reason of the complexity and difficulty of our law, litigation can only be properly conducted by professional men, it is absolutely necessary that a man *** should have recourse to the assistance of professional lawyers, and *** it is equally necessary *** that he should be [**7] able to place unrestricted and unbounded confidence in the professional agent, and that the communications he so makes to him should be kept secret * * *,' Jessel, M.R. in *Anderson v. Bank, 2 Ch.D. 644, 649 (1876).* Nothing in the policy of the privilege suggests that attorneys, simply by placing accountants, scientists or investigators on their payrolls and maintaining them in their offices, should be able to invest all communications by clients to such persons with a privilege the law has not seen fit to extend when the latter are operating under their own steam. On the other hand, in contrast to the Tudor times when the privilege was first recognized, see 8 Wigmore, Evidence, § 2290, the complexities of modern existence prevent attorneys from effectively handling clients' affairs without the help of others; few lawyers could now practice without the assistance of secretaries, file clerks, telephone operators, messengers, clerks not yet admitted to the bar, and aides of other sorts. 'The assistance of these agents being indispensable to his work and the communications of the client being often necessarily committed to them by the attorney or by the client himself, the privilege [**8] must include all the persons who act as the attorney's agents.' 8 Wigmore, Evidence, § 2301; Annot., *53 A.L.R. 369 (1928).* n2

Indeed, the Government does not here dispute that the privilege covers communications to non-lawyer employees with 'a menial or ministerial responsibility that involves relating communications to an attorney.' We cannot regard the privilege as confined to 'menial or ministerial' employees. Thus, we can see no significant difference between a case where the attorney sends a client speaking a foreign language to an interpreter to make a literal translation of the client's story; a second where the attorney, himself having some little knowledge of the foreign tongue, has a more knowledgeable non-lawyer employee in the room to help out; a third where someone to perform that same function has been brought along by the client; and a fourth where the attorney, ignorant of the foreign language, sends the client to a non-lawyer proficient in it, with instructions to interview

the client on the attorney's behalf and then render his own summary of the situation, perhaps drawing on his own knowledge in the process, so that the attorney can give the client proper legal [**9] advice. All four cases meet every element of Wigmore's famous formulation, § 2292, '(1) Where legal advice of any kind is sought (2) from a professional legal adviser in his capacity as such, (3) the communications relating to that purpose, (4) made in confidence (5) by the client, (6) are at his instance permanently protected (7) from disclosure by himself or by the legal adviser, (8) except the protection be waived,' save (7); literally, none of them is within (7) since the disclosure [*922] is not sought to be compelled from the client or the lawyer. Yet § 2301 of Wigmore would clearly recognize the privilege in the first case and the Government goes along to that extent; § 2301 would also recognize the privilege in the second case and § 2311 in the third unless the circumstances negated confidentiality. We find no valid policy reason for a different result in the fourth case, and we do not read Wigmore as thinking there is. Laymen consulting lawyers should not be expected to anticipate niceties perceptible only to judges -- and not even to all of them.

This analogy of the client speaking a foreign language is by no means irrelevant to the appeal at hand. Accounting [**10] concepts are a foreign language to some lawyers in almost all cases, and to almost all lawyers in some cases. Hence the presence of an accountant, whether hired by the lawyer or by the client, while the client is relating a complicated tax story to the lawyer, ought not destroy the privilege, any more than would that of the linguist in the second or third variations of the foreign language theme discussed above; the presence of the accountant is necessary, or at least highly useful, for the effective consultation between the client and the lawyer which the privilege is designed to permit. n3 By the same token, if the lawyer has directed the client, either in the specific case or generally, to tell his story in the first instance to an accountant engaged by the lawyer, who is then to interpret it so that the lawyer may better give legal advice, communications by the client reasonably related to that purpose ought fall within the privilege; there can be no more virtue in requiring the lawyer to sit by while the client pursues these possibly tedious preliminary conversations with the accountant than in insisting on the lawyer's physical presence while the client dictates a statement [**11] to the lawyer's secretary or to interviewed by a clerk not yet admitted to practice. What is vital to the privilege is that the communication be made in confidence for the purpose of obtaining legal advice from the lawyer. If what is sought is not legal advice but only accounting service, as in *Olender v. United States, 210 F.2d 795, 805-806 (9 Cir. 1954)*, see *Reisman v. Caplin, 61-2 U.S.T.C. P9673 (1961)*, or if the advice sought is the accountant's rather than the lawyer's, no privilege exists. We recognize this draws what may seem to some a rather arbitrary line between a case where the client communicates first to his own accountant (no privilege as to such communications, even though he later consults his lawyer on the same matter, *Gariepy v. United States, 189 F.2d 459, 463 (6 Cir. 1951))*, n4 and others, where the client in the first instance consults a lawyer who retains an accountant as a listening post, or consults the lawyer with his own accountant present. But that is the inevitable consequence of having to reconcile the absence of a privilege for accountants and the effective operation of the privilege of client and lawyer under conditions where the lawyer needs outside [**12] help. We realize also that the line we have drawn will not be so easy to apply as the simpler positions urged on us by the parties -- the district judges [*923] will scarcely be able to leave the decision of such cases to computers; but the distinction has to be made if the privilege is neither to be unduly expanded nor to become a trap. n5

II.

The application of these principles here is more difficult than it ought be in future cases, because the extreme positions taken both by appellant and by the Government, the latter's being shared by the judge, resulted in a record that does not tell us how Hopps came to be communicating with Kovel rather than with Kamerman. The Government says the burden of establishing the privilege was on Kovel and, since he did not prove all the facts essential to it even on our view, the sentence must stand. Kovel rejoins that the Government always has the burden of showing a criminal defendant's guilt and, since the proof does not negate the possible existence of a privilege, the sentence must fall.

We follow the Government's argument at least to this extent; If we were here dealing with a trial at which a claim of privilege like Kovel's [**13] had been overruled and the witness had answered, we should not reverse, since ' 'the burden is on the objector to show that the relation' giving rise to the privilege existed. *Woodrum v. Price, 104 W.Va. 382, 389, 140 S.E. 346, 349 (1927)*. On the other hand, appellant is right that, in a prosecution for criminal contempt, the ultimate burden of persuasion on the issue of privilege remains the Government's, see *Michaelson v. United States, 266 U.S. 42, 66, 45 S.Ct. 18, 69 L.Ed. 162 (1924); United States v. Fleischman, 339 U.S. 349, 70 S.Ct. 739, 94 L.Ed. 906 (1950); United States v. Patterson, 219 F.2d 659 (2 Cir. 1955)*; e.g., if Kamerman had testified he had told Hopps preliminarily to discuss with Kovel the transactions Kovel declined to disclose, and the Government challenged this testimony, it would have had the burden of convincing the judge on the facts. The burden that the Government's proof did shift to Kovel was that of going forward with evidence supporting the claim of privilege, *United States v. Fleischman, supra*. Kovel did not discharge that burden, on our view of the law; he claims

he was relieved of any need of doing so since the course of the proceedings had made it [**14] apparent that no evidence he could have submitted would have influenced the district judge and the law does not require the ritual performance of a useless act, citing *United States v. Zwillman, 108 F.2d 802 (2 Cir. 1940)*. However, the needs of the appellate court also must be considered; in order to preserve Kovel's position on appeal counsel should have proffered the necessary evidence and, if the judge would not receive it, should have made an offer of proof, along the lines prescribed in civil cases by F.R.Civ.Proc. 43(c), 28 U.S.C. Without this we are left in the dark whether a remand will serve any purpose; although the Zwillman opinion dispensed with a formal offer, *108 F.2d p. 804*, the record there afforded more assurance that the evidence the judge had refused to consider might sustain the privilege than we have here with respect to evidence not mentioned before the judge, whether or not it exists in other grand jury minutes. However, the uncertainty as to the applicable legal principle, the fixed view of the judge, and the haste with which the proceedings were here conducted because of the prospective running of the statute of limitations, extenuate although they do not [**15] altogether excuse the failure of Kovel's counsel to make a proper offer of proof; and a remand for determination of a few simple facts by the judge will not be burdensome. With petitioner's liberty at stake, we believe that the proper course, *28 U.S.C. § 2106*.

A final point requires consideration, namely, the Government's contention that the question appellant declined to answer was designed to provide the [*924] very factual basis which, on our view, was needed to determine whether the privilege existed. On one reading it was exactly that. If the judge had so explained the question, Kovel would have been bound to answer it to him; a witness claiming the attorney-client privilege may not refuse to disclose to the judge the circumstances into which the judge must inquire in order to rule on the claim, *People's Bank of Buffalo v. Brown, 112 F. 652 (3 Cir. 1903); Steiner v. United States, 134 F.2d 931, 935 (5 Cir. 1943); Schwimmer v. United States, 232 F.2d 855, 864* (8 Cir.), cert. denied, *352 U.S. 833, 77 S.Ct. 48, 1 L.Ed.2d 52 (1956)*. However, the question was susceptible of other meanings; Kovel could well have understood it as calling for an answer relating to the substance [**16] of what Hopps had told him, a substance that might have included admissions whose disclosure would be seriously damaging. On the previous day the direction to answer this question had been linked with two others relating to substance and, just prior to the critical refusal, the Assistant had made it plain that still other questions might come. Although not entirely clear, it seems that the 'purpose' of Hopps in sending the figures may have been stated in a letter. If so, Kovel would doubtless have been thinking of whatever the letter said and we do not know what that was; yet the idea of allowing the judge preliminarily to examine the letter was not advanced by anyone. Moreover, the proper practice is for the judge to conduct his preliminary inquiry into the existence of the privilege with the jury excused, see *Steiner v. United States, supra, 134 F.2d at 934-935*; here the question was asked with the jury present. Kovel's understanding of the question also may be explored on the remand -- although, in view of what we have been compelled to say on the subject, perhaps without too much practical effect.

The judgment is vacated and the cause remanded for further proceedings consistent [**17] with this opinion.

n1. 'An attorney or counselor at law shall not disclose, or be allowed to disclose, a communication, made by his client to him, or his advice given thereon, in the course of his professional employment, nor shall any clerk, stenographer or or other person employed by such attorney or counselor *** disclose, or be allowed to disclose, any such communication or advice.'

n2. N.Y.Civil Practice Act, § 353, is a legislative recognition of this principle. We doubt the applicability of the New York statute in a Federal grand jury proceeding; plainly, under F.R.Crim.Proc. 26, 18 U.S.C., it would not be applicable in a Federal criminal trial and we cannot believe the framers of the Criminal Rules intended state law to apply in the former case when it would not in the latter. However, decision of the issue is unnecessary, for there is nothing to indicate the New York legislature intended to do more than enact the principles of the common law.

n3. To such extent as the language in *Himmelfarb v. United States, 175 F.2d 924, 939 (9 Cir. 1949)*, may be contra, we must respectfully disagree. The amicus curiae brief suggests the actual decision in Himmelfarb may be supported because the record there shows the information had been given by the client for the precise purpose of transmission to a special agent of the Internal Revenue Service and had in fact been so transmitted pursuant to the client's authorization; if that be so, the necessary element of confidentiality was lacking. [**18]

n4. We do not deal in this opinion with the question under what circumstances, if any, such communications could be deemed privileged on the basis that they were being made to the accountant as the client's agent for the purpose of subsequent communication by the accountant to the lawyer; communications by the client's agent

to the attorney are privileged, 8 Wigmore, Evidence, § 2317-1. See *Lalance & Grosjean Mfg. Co. v. Haberman Mfg. Co., 87 F. 563* (C.C.S.D.N.Y., 1898).

n5. *City & County of San Francisco v. Superior Court, etc., 37 Cal.2d 227, 231 P.2d 26, 25 A.L.R.2d 1418 (1951)*, and *State v. Kociolek, 23 N.J. 400, 129 A.2d 417 (1957)*, accord generally with the above analysis.

LONGS DRUG STORES, a California corporation; Ray and Jane Doe Fragie; Gregg and Jane Doe King; Jim and Jane Doe McVeigh; Dixie and John Doe Lard; Lynn and John Doe Schmidt, Petitioners, v. The Honorable Joseph D. HOWE, Maricopa County Superior Court Judge, Respondent, and William and Toria Vanee Sorman, Respondents Real Parties in Interest

No. 16242-SA

Supreme Court of Arizona

134 Ariz. 424; 657 P.2d 412; 1983 Ariz. LEXIS 142

January 4, 1983

PRIOR HISTORY:
[***1]

SPECIAL ACTION

PRAYER FOR RELIEF GRANTED IN PART

DISPOSITION:
Relief granted in part, discovery order vacated in part, and case remanded.

COUNSEL:
Fennemore, Craig, von Ammon & Udall by Thomas V. Rawles, Phoenix, for petitioners.

Hocker & Axford by Naida B. Axford, Tempe, for respondents real parties in interest.

JUDGES:
En Banc. Feldman, Justice. Holohan, C.J., Gordon, V.C.J., and Hays and Cameron, JJ., concur.

OPINIONBY:
FELDMAN

OPINION:

[*426] [**414] By special action, petitioners challenge an order of the trial court which required production of statements and reports. There being no remedy by appeal and the issues raised in this special action being sufficiently important to justify review, *Jolly v. Superior Court of Pinal County, 112 Ariz. 186, 188, 540 P.2d 658, 660 (1975); Zimmerman v. Superior Court, 98 Ariz. 85, 87, 402 P.2d 212, 213 (1965),* we accepted jurisdiction pursuant to Ariz. Const. art. 6, § 5(4).

William A. Sorman (Sorman) and Toria Vance Sorman brought an action in the Superior Court of Maricopa County against the petitioners here, Longs Drug Stores and several of its employees (Longs). Sorman alleged he was wrongfully discharged from his employment with [***2] Longs and sought damages for wrongful termination of the employment contract.

The incomplete record before us indicates that immediately after Sorman was terminated, he retained the services of counsel. Longs learned of this and one of its executive employees requested Longs' house counsel, Barker, to gather the facts and render legal advice. Assuming that litigation was possible, if not probable, Barker gathered some information with regard to the nature of the claim, discussed the matter with Sorman's counsel, and then requested that representatives of Farmers Insurance Group (Farmers) undertake an investigation of the circumstances surrounding Sorman's termination. An employee of Farmers undertook an investigation which included discussions with Longs' employees, taking recorded statements made by Longs' employees and "reviewing those statements with such employees." Reports and copies of the statements were then provided to Barker and reviewed by him as part of his evaluation of the case and, presumably, formed the basis for whatever legal advice he may have rendered to Longs.

The investigator took the statements in May of 1982. Sorman later requested production of the statements [***3] and reports pursuant to Ariz.R.Civ.P. 34. n1 On August 2, 1982, Longs responded, refusing to produce the statements or reports on the grounds of the "attorney/client and work product privileges." Sorman then moved under Rule 37 for an order requiring Longs to produce the following:

Any and all reports written by independent investigators included but not limited to George Columbo [the Farmers claims investigator] which describe or in any

way relate to plaintiff William Sorman and/or his termination from Longs.

By minute entry order dated October 1, 1982, the trial court granted Sorman's motion. Longs then filed this special action, claiming that the order requiring them to produce the witnesses' statements and investigative reports was arbitrary, capricious and an abuse of discretion. We find that on the facts of this case the breadth of the trial court's order exceeded the limits set by Rule 26(b)(3).

n1 The Arizona Rules of Civil Procedure will hereinafter be referred to as Rule ___.

THE [***4] ATTORNEY-CLIENT PRIVILEGE

Longs claims that the reports made by Columbo and statements taken by him are [*427] [**415] immune from discovery under the attorneyclient privilege. A.R.S. § 12-2234. This argument rests upon a two-step analysis. First, Longs claims that Columbo was an agent of its attorney, Barker. Thus, any communications received by the investigator from Barker's "client" were privileged. Second, based upon the recent United States Supreme Court decision in *Upjohn Co. v. United States, 449 U.S. 383, 101 S.Ct. 677, 66 L.Ed.2d 584 (1981)*, n2 Longs claims the communications made by Longs' lower-level employees to the investigator were communications from the "client" and were protected by the privilege.

n2 The Court in Upjohn held that communications made by lower-level Upjohn employees to counsel for Upjohn at the direction of corporate superiors of the company, in order for the counsel to provide legal advice to the company, were protected against compelled disclosure by the attorney-client privilege. *Id. 449 U.S. at 394, 101 S.Ct. at 685.* The Court rejected the "control group" test which applied the privilege only to communications directed to the lawyer from those corporate employees who would be part of the group which would control implementation of the lawyer's advice or instructions. *Id. at 396, 101 S.Ct. at 686.*

[***5]

Addressing the first prong of this argument, we recognize that some courts have extended the privilege to communications relayed from client to attorney through the latter's agents and intermediaries, including investigators. See *United States v. Kovel, 296 F.2d 918, 920-23 (2d Cir.1961); American National Watermattress Corp. v. Manville, 642 P.2d 1330, 1333-34 (Alaska 1982); City and County of San Francisco v. Superior Court, 37 Cal.2d 227, 234-38, 231 P.2d 26, 29-32 (1951)*; 1 M. Udall & J. Livermore, Arizona Practice, Law of Evidence § 74, at 140-41 (2d ed. 1982). Even assuming, without deciding, that we were to adopt this reasoning, we do not agree that the Farmers investigator was an agent of Barker to the extent that the attorney-client privilege is applicable.

We have previously held that statements taken from an insured by insurance investigators working on a case in anticipation of litigation are not communications to counsel and are not within the attorneyclient privilege. *Butler v. Doyle, 112 Ariz. 522, 525, 544 P.2d 204, 207 (1975)*; see also *State Farm Insurance Company v. Roberts, 97 Ariz. 169, 175, 398 P.2d 671, 674 (1965).* Longs attempts [***6] to distinguish Butler on the grounds that the record in this case does not indicate that Farmers was investigating the claim because of any interest of its own as insurer, but was doing so only at the request of Barker. This is true; however, the record also fails to provide any information at all with respect to the reason for Farmers' involvement. Longs argues that on this record the trial court was bound to assume that Farmers had "lent" its claims investigator to Longs for the purpose of making this investigation, and that Farmers was not involved in the case as an insurer. We do not believe the trial judge is required to indulge in assumptions so contrary to common experience. If Columbo had been lent to Longs so that his services were performed only for Longs and it was work in which Farmers had neither interest nor right, then it was incumbent upon Longs to make a specific record on that point. n3 Having failed to do so, Longs [*428] [**416] failed in its burden of establishing that the material in question fell within the attorney-client privilege. The trial court was correct in concluding that the rule of Butler v. Doyle was applicable and that the material [***7] was not within the attorney-client privilege.

n3 It is common knowledge that insurance companies perform investigations on claims for which they provide coverage or on which they may have some risk or exposure of coverage. In such situations, the results of their investigation, including the statements which they may take from the insured, are not within the privilege. *Butler v. Doyle, supra.* While it is certainly possible that Farmers might lend its investigator to Longs in a case in which Farmers had no interest as an insurer, so that the Farmers employee was actually acting as an employee of Longs and an agent of its house counsel, the affidavits supporting Longs' motion in the court below fall far short of establishing such an unusual situation. The affidavit of Barker, the

house counsel, states that he "requested" Farmers' representative to "undertake an investigation of Mr. Sorman's termination in anticipation of possible litigation ...." The affidavit further states that the investigation "undertaken at my direction included" various activities and that the results of the investigation and the statements taken by the investigator "have been provided to me for my review in anticipation of litigation ... as well as the formation of legal advise [sic] to Longs." No other explanation was given of the relationship between Longs and Farmers. On this record, the trial court was not compelled to assume that the Farmers claims investigator was acting solely as an investigator for Longs' house counsel and that the matter was one in which Farmers had no concern whatsoever.

[***8]

Having concluded that the investigator was not acting solely as an agent of the attorney, we need not reach the second issue concerning the applicability of the Upjohn decision to these facts.

TRIAL PREPARATION MATERIAL

Longs next asserts that the statements and reports were made and obtained in anticipation of litigation and are therefore immune from discovery under the "work product privilege."

We note at the outset that the concept of "work product" immunity was never a "privilege" in American jurisprudence as it was in England. *Hickman v. Taylor, 329 U.S. 495, 509-10, 67 S.Ct. 385, 393, 91 L.Ed. 451 (1947).* The Court in Hickman recognized, however, "the general policy against invading the privacy of an attorney's course of preparation" that is "so essential to an orderly working of our system of legal procedure." *Id. at 512, 67 S.Ct. at 394.* In order to effectuate this policy and provide protection to material such as witness statements taken during the course of an attorney's preparation, the Court stated that it was incumbent on the party seeking discovery of "relevant and non-privileged facts" in the other party's possession to "establish adequate reasons [***9] to justify production." n4 *Id. at 511-12, 67 S.Ct. at 394.*

n4 When Hickman was decided, Rule 34 required a showing of "good cause" in order to obtain an order requiring another party to produce documents. This language was construed by the Hickman court as implicitly requiring a showing of necessity by the moving party before such materials would be discoverable. *Id. at 512, 67 S.Ct. at 394.*

The Court afforded more protection, however, to materials which reflect the attorney's mental impressions or opinions about a case. The Court reasoned that:

Were such materials open to opposing counsel on mere demand, much of what is now put down in writing would remain unwritten. An attorney's thoughts, heretofore inviolate, would not be his own. Inefficiency, unfairness and sharp practices would inevitably develop in the giving of legal advice and in the preparation of cases for trial. The effect on the legal profession would be demoralizing. And the interests of the clients and the cause [***10] of justice would be poorly served.

Id. at 511, 67 S.Ct. at 393-94.

Arizona practice has always conformed to the Hickman rule on the question of discovery of an attorney's trial preparation materials. See *Zimmerman v. Superior Court, 98 Ariz. 85, 402 P.2d 212 (1965); Dean v. Superior Court, 84 Ariz. 104, 324 P.2d 764 (1958).*

The protection for trial preparation materials was reformulated in the revision of the discovery rules in 1970. In pertinent part, Rule 26(b)(3) now provides:

Subject to the provisions of subdivision (b)(4) of this rule, a party may obtain discovery of documents and tangible things otherwise discoverable under subdivision (b)(1) of this rule and prepared in anticipation of litigation or for trial by or for another party or by or for that other party's representative (including his attorney, consultant, surety, indemnitor, insurer, or agent) only upon a showing that the party seeking discovery has substantial need of the materials in the preparation of his case and that he is unable without undue hardship to obtain the substantial equivalent of the materials by other means. In ordering discovery of such materials when the required [***11] showing has been made, the court shall protect against disclosure of the mental impressions, conclusions, opinions, or legal theories of an attorney or other representative of a party concerning the litigation.

[*429] [**417] The 1970 revisions eliminated the "good cause" language as a predicate to production under Rule 34. With respect to trial preparation materials, Rule 26(b)(3) substituted as a requirement a showing of both a "substantial need" for the materials and an inability "without undue hardship" to obtain the substantial equivalent of the materials by other means. As indicated by the State Bar Committee's Notes to the 1970 amendments, the reformulation was not intended to materially change the previous standard applied to the production of trial preparation materials under the old rule. n5 In addition, trial preparation materials prepared by a party's representative are within the protection of the Rule. As the language of the Rule indicates, this would

include a party's insurer. *Butler v. Doyle, 112 Ariz. at 524, 544 P.2d at 206.*

> n5 The standards of the [new] Rule [26(b)(3)] are very much in accord with *Dean v. Superior Court, 84 Ariz. 104, 113, 324 P.2d 764 (1958)* .... As in *Zimmerman v. Superior Court, 98 Ariz. 85, 402 P.2d 212 (1965)*, the Rule, while it gives strong protection to work product, does not extend the quality of absolute protection beyond the "mental impressions, conclusions, opinions or legal theories" of the person who is entitled to this protection.
>
> State Bar Committee Note.

[***12]

It is clear, therefore, that the statements and reports in this case are trial preparation materials which fall within the protection of Rule 26(b)(3). *Hickman v. Taylor, supra; Dean v. Superior Court, supra.*

With this in mind, we turn now to consideration of that portion of the trial court's order which required production of the statements taken from the witnesses. The standard of review is whether the trial court abused its discretion in determining that the requirements of Rule 26(b)(3) had been met. Cf. *Watts v. Superior Court, 87 Ariz. 1, 4, 347 P.2d 565, 566-67 (1959).*

Ordinarily, if witnesses are available and can be interviewed by a party, there will be no grounds upon which to order production of the statements taken by the opposition. *Dean v. Superior Court, 84 Ariz. at 113, 324 P.2d at 770.* If, however, good cause is shown that the statements are sought to impeach or determine the credibility of the witnesses, or there is a sufficient showing of the unavailability, hostility or problems of recollection of the witnesses, then the court may order the production of the statements. See *Hickman v. Taylor, 329 U.S. at 511, 67 S.Ct. at 394; Dean v. Superior* [***13] *Court, 84 Ariz. at 113, 324 P.2d at 770;* 8 C. Wright & A. Miller, Federal Practice and Procedure § 2025 (1970). Similarly, the trial court may order production upon a showing that the statements contain admissions or are unique because they were taken soon after the event. *Butler v. Doyle, 112 Ariz. at 524, 544 P.2d at 206.*

In this case, Sorman alleges that the statements may contain admissions helpful to the case. Sorman also claims that Barker had instructed Sorman's attorney not to interview any Longs employees except in Barker's presence. Under these circumstances, Sorman argues that it would be impossible to obtain the substantial equivalent of the statements procured by the investigator. The trial court could have determined that witnesses who are employees of the defendant might not be as forthcoming to the plaintiff as ordinary witnesses and that interviews in the presence of defense counsel would not be very useful or informative. Defendant argues that plaintiffs chose to do nothing, let the defense do all the work, and are now attempting to gain the benefits of defendant's preparation. While the record would support a finding to this effect and a consequent [***14] refusal to order production, the trial court apparently rejected that contention by ordering production of the statements. On these facts, it was within its discretion to do so.

Given the above factors and Sorman's sudden termination without notice or previous warning, we hold that the trial court did not abuse its discretion in its determination that Sorman had a substantial need for the statements and was unable without undue hardship to obtain the substantial equivalent by other means.

[*430] [**418] We have much more difficulty, however, with the portion of the order which would compel production of the reports written by investigators "included but not limited to George Columbo which describe or in any way relate to ... Sorman and/or his termination from Longs." As noted earlier in this opinion, Rule 26(b)(3) expressly extends the protection afforded trial preparation material to material prepared by a party's representatives, including attorneys and insurers.

From our review of the record, it appears that the reports made by the investigator contained summaries of his interviews with Longs' employees and contained his subjective views and interpretations of the [***15] facts he collected. While trial preparation materials such as statements from witnesses may be disclosed upon a showing of substantial need and undue hardship, materials which reveal the attorney's mental processes are entitled to special protection. See *Upjohn Co. v. United States, 449 U.S. at 400, 101 S.Ct. at 688; Hickman v. Taylor, 329 U.S. at 512-13, 67 S.Ct. at 394-95.* As we stated in Dean:

> [S]tatements of prospective witnesses, whether obtained by counsel in preparation for trial or by other persons, should be disclosed upon a showing of good cause .... n[6] In construing this precise point we do not in any manner mean to infer that the work product of the attorney prepared in anticipation of litigation which concerns memoranda, briefs and writings prepared by counsel for his own use, as well as related writings which reflect an attorney's mental impressions, conclusions, opinions or legal theories, are subject to discovery upon a showing of good cause. It is immaterial whether the immunity granted against invading the privacy of an attorney's course of preparation for trial is based upon privilege or public policy as we think the need for

immunity [***16] is so well recognized that it is essential to an orderly working of our system of legal procedure.

Dean v. Superior Court, 84 Ariz. at 111, 324 P.2d at 769. The different treatment given to trial preparation material which reflects the attorney's mental impressions, conclusions, opinions and theories is now explicitly recognized in the rules. Rule 26(b)(3) now provides that in ordering production of trial preparation material "the court shall protect against disclosure of the mental impressions, conclusions, opinions or legal theories of an attorney or other representative of a party concerning the litigation." (Emphasis supplied.) Thus, memoranda or reports which contain a mix of factual information and information containing a lawyer's thoughts and conclusions may be produced if the trial court is able to protect against the disclosure of the lawyer's impressions, conclusions, opinions or theories. *Duplan Corp. v. Moulinage et Retorderie de Chavanoz, 509 F.2d 730, 736-37 (4th Cir.1974);* 8 C. Wright & A. Miller, supra § 2026, at 231-32; cf. *Jolly v. Superior Court of Pinal County, 112 Ariz. at 192, 540 P.2d at 664.* Where the material being sought, however, [***17] contains nothing but impressions, theories and the like, there will ordinarily not be grounds for production. *In re Grand Jury Investigation, 599 F.2d 1224, 1231 (3d Cir.1979).* n7

n6 Now, upon a showing of substantial need and inability to duplicate.

n7 Some courts have held that without exception this type of trial preparation material is immune from discovery. *Duplan Corp. v. Moulinage et Retorderie de Chavanoz, supra; In re Grand Jury Proceedings, 473 F.2d 840 (8th Cir.1973).* We do not decide that issue in this case.

In the case at bench, the record falls far short of providing support for an order requiring production of any portion of the reports. The names of witnesses were available through interrogatories and their statements have been ordered produced. The plaintiffs can draw their own conclusions and legal theories from this material without invading the privacy of the preparation of petitioner's attorney or those working for or with him, including the insurer.

Accordingly, we hold [***18] that the portion of the trial court's order requiring production [*431] [**419] of the investigators' reports was contrary to settled law and was an abuse of discretion. *Grant v. Arizona Public Service Co., 133 Ariz. 434, 652 P.2d 507 (1982).*

The prayer for relief is granted in part. That portion of the discovery order which requires production of the investigators' reports is vacated, and the case is remanded for further proceedings.

LEXSEE 1988 U.S. Dist. LEXIS 9363

Raymond SANTIAGO, et al., Plaintiffs, v. Ronald MILES, et al., Defendants

Civ. No. 86-0694L

UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF NEW YORK

121 F.R.D. 636; 1988 U.S. Dist. LEXIS 9363

July 26, 1988, Decided

COUNSEL:

[**1] Claudette Spencer and David A. Lewis, Legal Aid Society, Prisoners Rights Project, New York, New York, for Plaintiffs.

Carlos Rodriguez, Assistant Attorney General, New York State Department of Law, Rochester, New York, for Defendants

JUDGES:

Kenneth R. Fisher, United States Magistrate.

OPINIONBY:

FISHER

OPINION:

[*637] DECISION AND ORDER

KENNETH R. FISHER, UNITED STATES MAGISTRATE

This is a class action pursuant to *42 U.S.C. § 1981* and § 1983 on behalf of black and hispanic prisoners at the Elmira Correctional Facility. Plaintiffs allege intentional discrimination in the assignment of housing, in the assignment of programs, and in the administration of discipline by defendants who are employees of the New York State Department of Correctional Services at Elmira Correctional Facility.

Plaintiffs have moved to compel discovery of several documents as follows: (1) all inmate grievances filed at the Elmira Correctional Facility between January, 1984 and the present, (2) a list of preferred program assignments referred to by Richard Cerio in his December 8, 1987 deposition, (3) all weekly reports of preferred program assignments at the Elmira facility, (4) computer printouts from Albany showing all of the work locations in Elmira and the ethnicity of inmates in those [**2] locations, and (5) the complete personnel file of Correction Officer Art Wichtowski, First Officer of the Cage Floor at Elmira Correctional Facility. This motion has been referred to the Magistrate pursuant to *28 U.S.C. § 636*(b)(1)(A).

The parties have resolved all but one of these requests at oral argument of the motion. Left for decision is the motion to compel discovery of computer generated material. Samples of the printouts have been submitted in camera, and they fall within two categories. The first set of documents was directed to be prepared in early 1987, after this lawsuit began, by Assistant Attorney General Richard Barrantes, then an assistant counsel with the Department of Correctional Services. In response to the filing of the lawsuit, Barrantes met with Elmira Correctional Facility officials and then developed a computer program with another unspecified DOCS employee which generated these documents.

Barrantes describes this process as follows: "The purpose of these meetings was to discuss the present *42 U.S.C. § 1983* civil rights action, relevant case law and the data, to wit: statistical analysis, deponent considered necessary in preparation of a defense to this [**3] action." (Barrantes supplemental affidavit, at para. 8). The unnamed DOCS employee "transmitted" printouts in this first category directly to Barrantes. Included in these documents are a "statistical analysis" of the disparity in job assignments by ethnicity and "raw data pertaining to the ethnic distribution of inmates in preferred assignments" (Barrantes supplemental affidavit, at para. 10).

For awhile, these same printouts were also sent to officials at Elmira because the "raw data facilitated the preparation of .... ethnic distribution reports .... by Richard Cerio at Elmira Correctional Facility." (Barrantes supplemental affidavit, at para. 11). Since September of 1985, these ethnic breakdown lists had been prepared at the facility. The computer material sent to Elmira was later "modified to exclude, among other things, the statistical analysis and the programs not regarded as preferred" (Barrantes supplemental affidavit,

at para. 12). Barrantes admits that the computer documents in this second category were used by Cerio for business purposes, but contends that, because "all of the information contained in Exhibit B [the second category] .... is derived from the information [**4] contained in Exhibit A [the first category] ...., both of these documents should be considered as work product and deemed privileged" (Barrantes affidavit at para. 14).

Defendants have consented to discovery of Cerio's monthly/weekly ethnic breakdown lists, but they resist discovery of the computer generated documents. The latter differ in that both sets of computer generated material contain a "cross-tabulation .... showing the statistical significance of [*638] any disparity in the distribution of job assignments by ethnicity." (Barrantes original affidavit at para. 5).

Analysis of defendants' attorney work-product objection to discovery of these documents begins with an examination of Fed. R. Civ. P. 26(b)(3), which provides as follows:

[A] party may obtain discovery of documents and tangible things otherwise discoverable under subdivision (b)(1) of this rule and prepared in anticipation of litigation or for trial by or for another party or by or for that other party's representative .... only upon a showing that the party seeking discovery has substantial need of the materials in the preparation of his case and that he is unable without undue hardship to obtain the substantial equivalent [**5] of the materials by other means. In ordering discovery of such materials when the required showing has been made, the court shall protect against disclosure of the mental impressions, conclusions, opinions, or legal theories of an attorney or other representative of a party concerning the litigation.

See *Hickman v. Taylor, 329 U.S. 495, 91 L. Ed. 451, 67 S. Ct. 385 (1947).*

There can be little doubt that the printouts produced from a computer program developed by counsel and another government employee in response to the filing of this lawsuit are "documents and tangible things .... prepared in anticipation of litigation or for trial" within the meaning of Rule 26(b)(3). The documents in the first category are therefore subject to the qualified immunity provided for in the rule, and plaintiffs do not seriously dispute this proposition (Supplemental Memorandum, at 4). The issue in this case is whether defendants may avoid discovery, even in the face of plaintiffs' asserted showing of substantial need, because an examination of the printouts would involve "disclosure of the mental impressions, conclusions, opinions, or legal theories of an attorney or other representative of a party concerning the litigation." [**6] Fed. R. Civ. P. 26(b)(3).

The computer printouts, produced from a program developed by counsel for this very litigation, contain raw data not protected by the attorney work product doctrine. However, the printouts themselves reflect, because of counsel's participation in developing the computer program, an attorney's "selection process [which] itself represents defense counsel's mental impressions and legal opinions as to how the evidence in the documents relates to the issues and defenses in the litigation." *Sporck v. Peil, 759 F.2d 312, 315 (3rd Cir. 1985)*, cert. denied, *474 U.S. 903, 88 L. Ed. 2d 230, 106 S. Ct. 232 (1985).* As stated in Sporck, "We believe that the selection and compilation of documents by counsel in this case in preparation for pretrial discovery falls within the highly-protected category of opinion work product." *Id., 759 F.2d at 316.* Accord, *Shelton v. American Motors Corporation, 805 F.2d 1323, 1329 (8th Cir. 1986); James Julian, Inc. v. Raytheon Company, 93 F.R.D. 138, 144 (D. Del. 1982); Berkey Photo, Inc. v. Eastman Kodak Company, 74 F.R.D. 613, 616 (S.D.N.Y. 1977).*

The Second Circuit has recognized the selection and compilation doctrine as a "narrow exception" [**7] to the general rule that documents received by lawyers from their clients, "which would not be protected if they remained in the clients' hands, would not acquire protection merely because they were transferred" to the lawyer. *Gould Inc. v. Mitsui Mining & Smelting Co., Ltd., 825 F.2d 676, 679-80 (2d Cir. 1987).* However, the circuit court held that application of this narrow exception "depends upon the existence of a real, rather than speculative, concern that the thought processes of .... counsel in relation to pending or anticipated litigation would be exposed." *Id., at 680.* In addition, the court stated that application of the Sporck exception may depend on the equities of the case, which includes consideration whether "the files from which documents have been culled by .... [counsel] were not otherwise available to .... [the party] or were beyond the reasonable access to [the party]." *Id., 825 F.2d at 680.*

The discussion of the equities of the case might, at first glance, suggest a retreat from the nearly "absolute" protection afforded [*639] mental impression work product under Fed. R. Civ. P. 26(b)(3). See *In re Murphy, 560 F.2d 326, 336 (8th Cir. 1977); Duplan* [**8] *Corporation v. Moulinage et Retorderie de Chavanoz, 509 F.2d 730, 733-35 (4th Cir. 1974)*, cert. denied, *420 U.S. 997, 43 L. Ed. 2d 680, 95 S. Ct. 1438 (1975).* The Supreme Court has made "clear" that mental impression "work product cannot be disclosed simply on a showing of substantial need and inability to obtain the equivalent without undue hardship." *Upjohn Company v. United States, 449 U.S. 383, 401, 66 L. Ed. 2d 584, 101 S. Ct. 677 (1981)* (reversing a Magistrate's discovery order upon such a showing). The Court refused, however, to decide whether mental impression "material

is always protected by the work-product rule," and instead simply stated that "a far stronger showing of necessity and unavailability by other means" is made applicable to mental impression work product than is made applicable to other work product by Fed. R. Civ. P. 26(b)(3). *Upjohn Company v. United States, 449 U.S. at 401-02.*

The Second Circuit has also not decided whether mental impression work product is always protected. In *In re John Doe Corporation, 675 F.2d 482 (2d Cir. 1982),* the Court recognized that Upjohn left the issue open when it observed that "work-product involving the mental processes of attorneys need to be divulged, if at all, [**9] only on a strong showing 'of necessity and unavailability by other means.' *449 U.S. at 402.*" *In re John Doe Corporation, 675 F.2d at 492.* The court stated that such work product is "entitled to the greatest protection available under the work-product immunity," *id., 675 F.2d at 493,* and it described the case before it as "the kind of rare occasion in which an attorney's mental processes are not immune." *Id., 675 F.2d at 492* (work product in aid of a criminal scheme) (citing *In re Murphy, 560 F.2d at 336 n. 19,* which states: "The delimitations of any rare exceptions to opinion work product immunity can await future adjudication").

Accordingly, this court considers the Second Circuit's statement in the Gould case, suggesting that the equities of whether the material is "not otherwise available" or is "beyond the reasonable access" of a party, as but an application of Upjohn and its prior decision in the John Doe Corporation case. Access to mental impressions, if ever to be permitted, may occur "only on a strong showing 'of necessity and unavailability by other means.'" *In re John Doe Corporation, 675 F.2d at 492* (quoting Upjohn).

Without referring [**10] to the Gould case, plaintiffs contend that "these printouts appear to be the only documents that contain information about race and program assignments for all assignments, and not just those designated by defendants as 'preferred programs.'" (Supplemental Memorandum, at 4) (emphasis supplied). Although plaintiffs refer to certain deposition testimony of Cliff Murphy to sustain this claim, the one page appended to their supplemental memorandum appears to refer exclusively to housing assignments. Moreover, the deposition testimony of Richard Cerio establishes that "when program assignments are made, they're also recorded in the central office" (Cerio deposition, at 6). Cerio testified to "preferred program assignments" (id.) and a list of "about 30 of them" that he prepared (id., at 8). However, without evidence to the contrary and because it just makes common sense, the court takes the above quoted testimony as establishing that all program assignments are recorded in the central office, presumably in a computer data base.

The suggestion repeatedly made by the court during oral argument, that these records of assignments may be obtained via a properly designed [**11] computer request, has not been refuted by defendants. Plaintiffs' speculation that defendants' silence on the issue forecloses the possibility of these records' procurement asks the court to assume too much. If the computer program was modified to generate a discrete set of documents for Cerio (see below), it may clearly be modified to generate a printout containing the raw data plaintiffs [*640] need, i.e., a printout showing all of the work locations at Elmira and the ethnicity of inmates in those locations. A request for raw information in computer banks is proper and the information is obtainable under the discovery rules. *Daewoo Electronics Company, Ltd. v. United States, 650 F. Supp. 1003, 1006 (C.I.T. 1986); Bills v. Kennecott Corporation, 108 F.R.D. 459, 461-62 (D. Utah 1985); National Union Electric Corporation v. Matsushita Electric Industrial Co., Ltd., 494 F. Supp. 1257, 1260-62 (E.D. Pa. 1980).*

Therefore, with respect to the first category of computer printouts, it is appropriate to apply the Sporck doctrine to this case. There can be little question on this record, which establishes that then assistant counsel Barrantes participated in the design of the computer [**12] program generating this material in connection specifically with preparing a defense to this lawsuit, that disclosure of the first set of documents would violate the Hickman v. Taylor doctrine and Fed. R. Civ. P. 26(b)(3). *Gould Inc. v. Mitsui Mining and Smelting Co., Ltd., 825 F.2d at 680; Sporck v. Peil, 759 F.2d at 315-17.* As to these documents the motion to compel is denied, and the cross-motion for a protective order is granted.

The second category of computer generated materials presents a more difficult problem. As a preliminary matter, the fact that documents in the first category were, for a brief time, forwarded to Richard Cerio at the facility for assistance in preparing the monthly/weekly breakdown reports does not deprive them of their character under the rule as attorney work product. Simply delivering attorney work product revealing counsel's mental processes to a governmental client's subordinate employees is a fortuitous circumstance in the work product analysis unless such delivery "has substantially increased the opportunities for potential adversaries to obtain the information." 8 Wright & Miller, Federal Practice and Procedure § 2024 p. 210 (1970). [**13] See *Transamerica Computer Company, Inc. v. International Business Machines Corporation, 573 F.2d 646, 647 n.1 (9th Cir. 1978)* (Waterman, J.). As stated in *In re Doe, 662 F.2d 1073 (4th Cir. 1981),* cert. denied, *455 U.S. 1000, 71 L. Ed. 2d 867, 102 S. Ct. 1632 (1982),* "the forfeiture or waiver must be consistent with a conscious disregard of the advantage that is otherwise protected by the work product rule." *Id., 662 F.2d at*

1073.

Disclosure to a person with an interest common to that of the attorney or the client normally is not inconsistent with an intent to invoke the work product doctrine's protection and would not amount to such a waiver. However, when an attorney freely and voluntarily discloses the contents of otherwise protected work product to someone with interests adverse to his or those of the client, knowingly increasing the possibility that an opponent will obtain and use the material, he may be deemed to have waived work product protection.

Id., 662 F.2d at 1081. See *In Re Grand Jury Subpoenas Dated December 18, 1981, 561 F. Supp. 1247, 1257 (E.D.N.Y. 1982);* 4 Moore's Federal Practice para. 26.64[4] (2d ed. 1984).

Because the disclosure here was to a DOCS employee and there [**14] is no reason to believe that delivery of the work product to Cerio was "deliberately employed to prepare – and thus, very possibly, to influence and shape -- testimony, with the anticipation that these efforts should remain forever unknowable and undiscoverable" *Berkey Photo, Inc. v. Eastman Kodak Company, 74 F.R.D. at 616,* or to "interlac[e]" discoverable fact "with core work product" *Bogosian v. Gulf Oil Corporation, 738 F.2d 587, 595 (3rd Cir. 1984),* there is no waiver of the work product immunity for those few documents in the first category which were delivered to Cerio. Disclosure to Cerio was made for the sole purpose of "facilitating" his preparation of the monthly/weekly ethnic breakdown reports which defendants have now turned over to plaintiffs while steadfastly maintaining the confidentiality of the computer material itself. *United States v. Gulf Oil Corporation, 760 F.2d 292, 295-96 (Em. App. 1985).*

[*641] After an initial period when the printouts sent to Barrantes were forwarded to Cerio at Elmira, the central office modified the format sent to Cerio. This second category of documents was not sent to Barrantes; indeed Barrantes has only second hand information [**15] concerning how the program was modified (Barrantes supplemental affidavit at para. 12 is based on "information and belief"). Barrantes does not specify who made the modification or for what purpose, but he admits that the second category of printouts are "presently transmitted to the Elmira Correctional Facility" (Barrantes supplemental affidavit, at para. 13).

That the computer printouts in the second category were prepared for Cerio's use in the preparation of his monthly/weekly ethnic breakdown reports concerning preferred job assignments is a critical fact, because the monthly/weekly breakdown reports were not prepared in anticipation of litigation. As Barrantes stated in his original affidavit, they "were being prepared on a monthly basis since September, 1985," well before initiation of the lawsuit (Barrantes affidavit at para. 4). And as defendant Donald McLaughlin testified at a deposition, these reports were conceived as part of a program developed at Elmira which responded to inmate administrative grievances concerning program assignments. Apparently, at Elmira, the inmates have formed an Inmate Liaison Committee and in 1985 this committee "brought up" the "possibility" [**16] of "an ethnic disproportion of inmates into various good jobs" (McLaughlin deposition at 53). Elmira officials assured the Inmate Liaison Committee that "we will now continually monitor that" (id., at 54) and McLaughlin ordered a monthly report for the purpose (id., at 55, 58). McLaughlin testified that this reporting process was ordered by him "long before the suit came down" (id., at 55). Defendant Miles indeed confirmed that the breakdowns "were first prepared on or about September, 1985 to assist in a review of facilities program assignment policies." (Miles affidavit at para. 5).

Cerio "looked at" the monthly/weekly reports as they came in, "and balance[d] .... [them] against our ethnicity percentages." (Deposition of Cerio, at 6). Cerio then referred the data, or his interpretation of it, to "the program committee" headed by defendant McLaughlin with appropriate recommendations concerning any disparity. According to Barrantes, the process of examination intensified when the lawsuit was filed (e.g., by preparation of weekly reports), but this basic scenario had been in place several months before the lawsuit commenced or even was envisioned by defendants (McLaughlin [**17] deposition, at 55, lines 15-23).

The generally accepted test of whether a document falls within the work product doctrine was set forth in *United States v. Gulf Oil Corporation, 760 F.2d at 296:*

Our inquiry should be to determine the "primary motivating purpose behind the creation of the document." See *United States v. Davis, 636 F.2d 1028, 1040 (5th Cir. 1981).* If the primary motivating purpose behind the creation of the document is not to assist in pending or impending litigation, then a finding that the document enjoys work product immunity is not mandated.

See also, *United States v. El Paso Company, 682 F.2d 530, 542-43 (5th Cir. 1982),* cert. denied, *466 U.S. 944, 80 L. Ed. 2d 473, 104 S. Ct. 1927 (1984); Colton v. United States, 306 F.2d 633, 639-40 (2d Cir. 1962),* cert. denied, *371 U.S. 951, 9 L. Ed. 2d 499, 83 S. Ct. 505 (1963).* The court finds that Cerio's original preparation of the monthly/weekly reports was in the ordinary course of the business of the Elmira Correctional Facility to facilitate inmate relationships with DOCS officials by prompt response to administrative inmate complaints.

Defendants' have offered no reason to suppose that Cerio's preparation of the weekly/monthly reports is now any less [**18] related to the admitted business purpose for their creation simply because of the institution of this lawsuit. In this case, the computer printouts in the second category which assisted Cerio in this endeavor are, upon the court's in camera examination, see *Gould, Inc. v. Mitsui Mining & Smelting* [*642] *Co., Inc., 825 F.2d at 680,* wholly different in form and somewhat different in content from the printouts in the first category sent to Barrantes. While there is ample reason to assume that the second category printouts used by Cerio are now prepared with the pending litigation in mind, the primary motivation for their creation concerns the on-going effort in the normal course of business at Elmira, begun well prior to litigation and not in contemplation of it, to appropriately respond to inmate grievances presented through the Inmate Liaison Committee. The nature of these second category printouts thus preclude any work product doctrine protection. *Mercy v. County of Suffolk, 93 F.R.D. 520, 522 (E.D.N.Y. 1982).*

Finally, contrary to defendants' contention, the derivation of the second category printouts from the first category documents sent to Barrantes is not controlling, especially [**19] in view of the lack of any specific showing that these quite different documents would reveal Barrantes' mental impressions. The focus of the court's inquiry is instead on the "primary motivating" force behind the creation of the documents. It is clear that the primary impetus for the first category documents was the litigation Barrantes faced. It is equally clear that the creation of the second category printouts was for the dominant purpose of assisting Cerio in the normal course of a well established and commendable pattern of business at Elmira Correctional Facility to respond to inmate complaints.

CONCLUSION

The motion to compel discovery of the computer material sent to assistant counsel Barrantes is denied, and a protective order is hereby granted as to it. The motion to compel discovery of the computer material of the second category sent to Richard Cerio is granted as indicated herein.

The foregoing constitutes a decision and order pursuant to *28 U.S.C. § 636*(b)(1)(A). The parties should be on notice that, pursuant to *28 U.S.C. § 636*(b)(1) and Local Rule 37(a)(2), this order shall be final unless within ten (10) days after being served with a copy thereof a party files with [**20] the Clerk and serves upon opposing counsel a written appeal specifying the party's objections and the manner in which it is claimed that this order is clearly erroneous or contrary to law.

SO ORDERED.